DOCKET

No. 87-1945-ASX
Status: GRANTED

Title: William A. Frazee, Appellant
v.
Illinois Department of Employment Security, et al.

Docketed:
May 3, 1988

Court: Appellate Court of Illinois,
Third District

Counsel for appellant: Whitehead,John W.

Counsel for appellee: Ruiz,Robert J.

Entry	Date	Note	Proceedings and Orders
1	May 3 1988	G	Statement as to jurisdiction filed.
2	Jun 28 1988		DISTRIBUTED. September 26, 1988
3	Jun 30 1988	X	Motion of appellee Illinois to dismiss or affirm filed.
4	Jul 13 1988	X	Reply brief of appellant William Frazee filed.
5	Oct 3 1988		PROBABLE JURISDICTION NOTED.
			**********
7	Nov 16 1988		Brief amicus curiae of Natl. Right to Work Legal Defense Foundation filed.
6	Nov 17 1988		Record filed.
		*	Certified copy of original record on appeal received.
8	Nov 17 1988		Joint appendix filed.
9	Nov 17 1988		Brief of appellant William Frazee filed.
10	Nov 17 1988		Brief amici curiae of American Jewish Congress, et al. filed.
11	Nov 17 1988		Brief amici curiae of Council on Religious Freedom, et al. filed.
12	Nov 17 1988		Brief amicus curiae of Anti-Defamation League of B'nai B'rith filed.
13	Nov 18 1988		Record filed.
		*	Certified copy of original record received.
14	Dec 22 1988		Brief of appellee Illinois in opposition filed.
15	Jan 4 1989		CIRCULATED.
17	Jan 6 1989		SET FOR ARGUMENT WEDNESDAY, MARCH 1, 1989. (3RD CASE.)
18	Jan 17 1989	X	Reply brief of appellant William Frazee filed.
19	Mar 1 1989		ARGUED.

JURISDICTIONAL

STATEMENT

87-1945

No._____

IN THE

Supreme Court of the United States

October Term, 1987

WILLIAM A. FRAZEE,

Appellant,

v.

DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD, Director of the Illinois Department of Employment Security; and BRUCE W. BARNES, Chairman, Board of Review, and KELLY SERVICES,

Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS FOR THE THIRD DISTRICT

JURISDICTIONAL STATEMENT

John W. Whitehead
Counsel of Record
David A. French
Deborah A. Ausburn
THE RUTHERFORD INSTITUTE
P.O. Box 510
9411 Battle Street
Manassas, VA 22110
(703) 369-0100
Counsel for Appellant

May 2, 1988

QUESTION PRESENTED

Whether a person who declines to work on Sunday because of a sincerely-held religious conviction must prove that his conviction is a tenet of an established religious sect or body in order to claim the protection of the First Amendment guarantee of free exercise of religion.

LIST OF PARTIES

The parties to the judicial proceedings in the state courts were the appellant, William A. Frazee, and the appellees, the State of Illinois Department of Employment Security; Sally Ward, Director of the Illinois Department of Employment Security; and Bruce W. Barnes, Chairman of the Board of Review of the State of Illinois Department of Employment Security. Appellee Kelly Services was a named Defendant in the administrative proceedings before the Referee and the Board of Review, but never appeared in the administrative proceedings or entered an appearance in the judicial proceedings in the state courts.

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Appellees.

ON APPEAL FROM THE
APPELLATE COURT OF ILLINOIS FOR THE THIRD DISTRICT

JURISDICTIONAL STATEMENT

William A. Frazee, the appellant, appeals from the final judgment of the Appellate Court of Illinois for the Third District, entered in the above-entitled proceeding on August 13, 1987, holding that § 603 of the Illinois Unemployment Insurance Act, as applied in this case, is not unconstitutional as a violation of Appellant's right of free exercise of religion guaranteed by the First Amendment of the Constitution of the United States.

OPINIONS BELOW

The order of the Illinois Supreme Court is not reported and is reprinted in the Appendix hereto, p. 9a., *infra.*

The opinion of the Appellate Court of Illinois for the Third District is reported at 159 Ill. App. 3d 474 and 512 N.E.2d 789, and is reprinted in the Appendix hereto, p. 10a, *infra.*

The memorandum decision of the Circuit Court of the Tenth Judicial Circuit of Illinois, Peoria County, (Manning, Judge), has not been reported. It is reprinted in the Appendix hereto, p. 20a, *infra.*

The decision of the Board of Review of the State of Illinois Department of Employment Security has not been reported and is reprinted in the Appendix hereto, p. 21a, *infra.*

JURISDICTION

The Appellate Court of Illinois, Third District, entered judgment on August 13, 1987, affirming an order of the Circuit Court of Peoria County. The Circuit Court had affirmed a decision of the appellee, Illinois Department of Employment Security, that William A. Frazee, appellant in this case, should be disqualified from receiving unemployment benefits, despite his claim that such disqualification was an unconstitutional application of the Illinois statute and a violation of his First Amendment free exercise rights.

After the Appellate Court denied rehearing, Mr. Frazee petitioned for leave to appeal to the Supreme Court of Illinois, which denied the petition on February 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). Should this Court determine that it does not have appellate jurisdiction, Appellant respectfully requests that this Court treat this jurisdictional statement as a petition for certiorari under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Illinois Unemployment Insurance Act, Section 603; Ill. Ann. Stat. ch. 48, par. 433 (Smith-Hurd 1986).

"§ 603. Refusal of work. An individual shall be ineligible for benefits if he has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the Director, or to accept suitable work when offered him by the employment office or an employing unit, or to return to his customary self-employment (if any) when so directed by the employment office or the Director. . . ."
(The statute is set out in its entirety in the Appendix, p. 1a, *infra).*

HOW THE FEDERAL QUESTION WAS RAISED

After Mr. Frazee refused a job assignment because it required work on Sunday in violation of his religious convictions, the Claims Adjudicator for the Illinois Department of Employment Security determined that his refusal was without good cause and that he was therefore disqualified from receiving unemployment benefits (Common Law Record [hereinafter C.] 17). Mr. Frazee, acting *pro se,* then applied for reconsideration of the Claims Adjudicator's determination,

citing his religious conviction against working on Sunday (C.26). This sincerely held religious conviction was based on Mr. Frazee's understanding of the requirements and tenets of Christianity. After a hearing at which Mr. Frazee was the only witness (C.32-44), the Referee affirmed the decision of the Claims Adjudicator (C.49). Mr. Frazee appealed *pro se* to the Board of Review, again explaining his religious convictions (C.51-53). The Board of Review affirmed the decision of the Referee (C.55-56; Appendix, *infra*, p. 21a), stating that a refusal to work due to religious convictions "must be based upon some tenets or dogma accepted by the individual of some church, sect, or denomination . . . ." (C.56; Appendix, *infra*, p. 22a).

Mr. Frazee, through counsel, subsequently filed a complaint for administrative review in the Circuit Court of the Tenth Judicial Circuit (C.1), alleging that the Board of Review's application of § 603 of the Illinois Unemployment Act was "contrary to... the First Amendment of the United States Constitution" in that it denied him "his right to free exercise of his religious principles." (C.3). The Circuit Court affirmed the decision of the Board of Review (C.93; Appendix, *infra*, p. 20a), and Mr. Frazee filed a notice of appeal to the Appellate Court of Illinois (C.94). In his appeal he again argued that the denial of unemployment benefits violated the First Amendment. Brief for Appellant, Case No. 3-86-0842, Appellate Court of Illinois, Third Judicial District.

The Appellate Court framed the issue regarding the application of § 603 of the Illinois Unemployment Insurance Act as follows:

> We have presented for determination in this appeal the question of whether the plaintiff's personal professed religious belief that he could not work on Sundays constituted good cause for his refusal of work.

Frazee v. Department of Employment Security, 159 Ill. App. 3d 474, 512 N.E.2d 789, 780 (1987); Appendix, *infra*, pp. 10a, 13a. The Appellate Court affirmed the trial court, holding that "the injunction against Sunday labor must be found in a tenet or dogma of an established religious sect. The plaintiff in this case does not profess to be a member of any such sect." *Id.* at 792; Appendix, *infra*, p. 18a. Mr. Frazee petitioned for rehearing, citing his right to free exercise of religion. The Appellate Court denied rehearing, and in Mr. Frazee's petition for leave to appeal to the Supreme Court of Illinois, he once again argued that the denial of unemployment benefits violated the United States Constitution. On February 3, 1988, the Supreme Court of Illinois denied Mr. Frazee leave to appeal. Appendix, *infra*, p. 9a.

STATEMENT OF THE CASE

In April, 1984, Appellant William Frazee was unemployed and seeking work through Kelly Services, who assigned him to various clerical jobs that they had during that month (C.33). After successfully performing several job assignments with that company, Mr. Frazee on April 30, 1984, spoke with company representatives about another temporary job. The Kelly Services representatives stated that they had a job with Designer Warehouse Outlet, an out-of-state company for whom Kelly Services was recruiting people to work (C.34, 40). The work involved retail sales of clothing (C.37,38).

When Mr. Frazee asked for more information about the days and hours of the job, the representatives told him that the job would require work from Wednesday, May 9, 1984, through Sunday, May 13, 1984 (C.34,35). Mr. Frazee is an adherent of Christianity, and his religious beliefs as a Christian proscribe non-emergency work on Sunday (C.35-36). Because of his religious conviction, he asked the Kelly Services representatives if it was possible for him to work Wednesday

through Saturday (C.35). The company responded that four days of work was unacceptable, and that if he was not available for all five days, he could not be considered for hire (C.35). Mr. Frazee answered, "Well, if I had to be available Sunday, I can't. As a Christian I can't do that" (C.35).

When Mr. Frazee applied for unemployment benefits, the Claims Adjudicator for the Illinois Department of Employment Security determined that his refusal was without good cause and that he was therefore disqualified from receiving employment benefits (C.17). Mr. Frazee, acting *pro se,* then applied for reconsideration of the Claims Adjudicator's determination, citing his religious conviction against working on Sunday (C.26). The Referee held a hearing on June 20, 1984 (C.32). Mr. Frazee was the only person who presented evidence at this hearing (C.32-43), thus, it is uncontroverted that Mr. Frazee's religious convictions are sincerely held and that those beliefs in fact allow only emergency work on Sunday (C.36-37). No alternate work arrangements accommodating his religious beliefs were presented to Mr. Frazee (C.36-37).

When the Referee affirmed the decision of the Claims Adjudicator (C.49), Mr. Frazee appealed to the Board of Review, again explaining his religious convictions (C.51-53). The Board of Review affirmed the decision of the Referee (C.55-56), stating that "[w]hen a refusal of work is based on religious convictions, the refusal must be based upon some tenets or dogma accepted by the individual of some church, sect, or denomination, and such a refusal based solely on an individual's personal belief is personal and noncompelling and does not render the work unsuitable." (C.56; Appendix, *infra,* p. 22a).

Mr. Frazee then filed a complaint for administrative review in the Circuit Court (C.1), alleging that the Board of Review's decision denied him his right to free exercise of religion under the First Amendment to the United States

Constitution (C.3). The Circuit Court affirmed the decision of the Board of Review (C.4; Appendix, *infra.,* p. 20a), and Mr. Frazee appealed to the Appellate Court of Illinois (C.94), again arguing that the denial of unemployment benefits violated the First Amendment. When that court affirmed the trial court, Appendix, *infra.,* p. 10a, Mr. Frazee petitioned for rehearing, citing his right to free exercise of religion. The Appellate Court denied rehearing, and in Mr. Frazee's petition for leave to appeal to the Supreme Court of Illinois, he once again argued that the denial of unemployment benefits violated the United States Constitution. The Supreme Court of Illinois denied Mr. Frazee leave to appeal on February 3, 1988. Appendix, *infra.,* p. 9a.

THE QUESTION IS SUBSTANTIAL

The question of what distinguishes religious beliefs from mere personal or philosophical beliefs for purposes of the Free Exercise clause of the First Amendment is an important one. This Court has not defined what constitutes a "religion" or protected religious belief apart from one case that involved a statutory determination. In the absence of definitive guidance from this Court, the federal and state courts have established conflicting, confusing boundaries for determining what beliefs and conduct are protected by the First Amendment.

This Court first undertook to define religious belief in *United States v. Seeger,* 380 U.S. 163 (1965). Because that case involved an interpretation of § 6(j) of the Universal Military Training and Service Act of 1948, its application to First Amendment cases has been limited.

The Court did consider the Constitutional definition of religion in *Wisconsin v. Yoder,* 406 U.S. 205 (1972), a case involving the claims of members of the Amish Church that Wisconsin's compulsory school attendance law violated their

religious beliefs. In ruling in favor of the parents, this Court held that a belief must be religious rather than philosophical or personal in order to be protected by the Free Exercise clause. *Id.* at 215-16. The opinion, however, did not establish the criteria to be applied to persons who, like the Amish, laid claim to certain religious beliefs, but, unlike the Amish, did not claim to follow the teachings of any particular religious group.

A somewhat analogous situation was presented in *Thomas v. Review Board,* 450 U.S. 707 (1981). The petitioner was a Jehovah's Witness who resigned from his job of fabricating turrets for military tanks because of his religious belief that it was wrong to participate in the production of weapons. The Indiana Supreme Court denied Thomas unemployment benefits on the grounds that his decision to resign was due more to "personal philosophical choice" than to religious belief. *Id.* at 713. That court based its decision in large part on the fact that another Jehovah's Witness had no religious scruples about working on tank turrets. *Id.* at 715. This Court reversed, stating that "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Id.* at 715-16.

Although the applicable case law fails to precisely delimit the boundaries of protected religious belief, the Court's holding in *Thomas* demonstrates that a person need not be following a universal tenet of an established sect in order to invoke the protections of the Free Exercise clause. Nonetheless, the fact that Thomas was a Jehovah's Witness, an organized sect, has provided many state courts with a rationale to exclude admittedly sincere but unique religious beliefs from the Free Exercise clause. In the instant case, for example, the Illinois Appellate Court, after reviewing this Court's decisions reversing the denial of unemployment benefits to people claiming a religious motivation for their actions, stated:

> Our examination of the foregoing cases reveals that a common thread was running through each case, namely, that in each case the claimant was a member of an established religious sect or church; that each of the claimants in refusing to work at a particular place or time was exercising what was believed to be a tenet, belief or teaching of an established religious body.

Frazee, 512 N.E.2d at 791, Appendix, *infra,* p. 15a.

The Illinois court decision is flawed in two respects. First, it never bothered to define what it meant by "established religious body." The court recognized that Mr. Frazee is a Christian, but apparently did not consider Christianity "an established religious body." Second, the decision ignores the clear import of *Thomas* by requiring that an individual be a member of a particular religious group and be motivated by a fundamental tenet of that group's collective faith.

The first error in the Illinois court's decision is its refusal to recognize belief in particular tenets of Christianity as deserving first amendment protection. The court recognized the religious roots of a belief in not working on Sunday, and traced that prohibition through the Bible. *Frazee,* 512 N.E.2d at 791, Appendix, *infra,* pp. 15a-16a. In spite of the undisputed theological basis of Mr. Frazee's belief, and its conformity to a historical (and to some a current) tenet of Christianity, the court declined to accept his belief as religious. The court apparently did so because of a concern about what Sunday would be "if professional football, baseball, basketball and tennis were barred," *id.* at 792, Appendix, *infra,* p. 17a, and because the rest of American society no longer agrees with Mr. Frazee. "[F]rom a day designated as a holy day it [Sunday] has evolved into a day of also permitting rest, recreation, business, industry and labor. Such a change is not surprising, but on the

contrary is dictated by the American way of life." *Id.* at 18a.

This analysis is completely at odds with history and the requirements of the First Amendment. There can be no doubt that if the Framers of the Constitution intended any religious system to be protected by the Free Exercise clause, they intended to include Christianity.[1]

Furthermore, one of the unique aspects of Protestant Christianity is that the individual has the responsibility and obligation to decide matters of faith through the exercise of individual conscience. *See, e.g., New Life Baptist Church Academy v. Town of East Longmeadow,* 666 F. Supp. 293, 317 (D. Mass. 1987) (differences common among born again Christians where structure permits individual churches to decide many matters of faith for themselves); *Stevens v. Berger,* 428 F. Supp. 896, 902 (E.D.N.Y. 1977) (individuals encouraged to study the Bible and develop personal understanding of its teachings). The fact, then, that Mr. Frazee's objection to working on Sunday is an individualized one, and not mandated by the particular Christian sect to which he belongs, is no proof that it is not religious. To the contrary, personalized convictions are hallmarks of Christianity. The Illinois court's failure to recognize this historical fact and refusal to include Christi-

[1] James Madison, for example, referred to religion as "the duty which we owe to our creator, and the manner of discharging it." Madison, *A Memorial and Remonstrance of the Religious Rights of Man,* in *Cornerstones of Religious Freedom in America* 84 (J. Blau ed. 1964). The *Declaration of Rights* adopted by Virginia in 1776 stated:

> That religion, or the duty which we owe our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that is the mutual duty of all to practice Christian forbearance, love and charity towards each other.

quoted in, Note, *The Sacred and the Profane: A First Amendment Definition of Religion,* 62 Tex. L. Rev. 139, 141 n. 10 (1982).

In proposing his Act for Establishing Religious Freedom in Virginia, Thomas Jefferson argued that the Act "was meant ... to comprehend within the mantle of its protection *the Jew and the Gentile, the Christian and the Mahometan, the Hindoo, and infidel of every denomination.*" American States Papers Bearing on Sunday Legislation 133 n. 1 (ed. W. Blakely 1911) (emphasis in original).

anity in its category of "established religious bodies" is a dangerous shift in First Amendment jurisprudence that should not be permitted.

Even more disturbing than the Illinois court's glib rewrite of history is its distortion of the principles established in *Thomas.* If the Appellate Court of Illinois were alone in its misinterpretation of *Thomas,* there would be little reason for this Court to consider the issue. Unfortunately, the Illinois court is not alone.

Many state courts have preceded the *Frazee* court in grafting onto the Free Exercise clause a requirement that a person be a member of a particular sect in order to claim constitutional protection. The Supreme Court of South Dakota, for example, held that a mission could not be considered a religious ministry absent evidence that it was directly affiliated with or supported by an organized religion and that its religious leaders were actually ordained ministers of recognized denominations. *City of Rapid City v. Kahler,* 334 N.W.2d 510 (S.D. 1983). *Accord, Stetina v. State,* 513 N.E.2d 1234, 1241 (Ind. App. 1987) (no Free Exercise protection for nutritionist absent evidence, *inter alia,* that church sponsored or compelled her beliefs and teachings); *Gleason v. Blache,* 487 So. 2d 561, 564 (La. Ct. App. 1986) (unable to determine whether belief was religious absent evidence identifying claimant's religious denomination); *In re Paternity Petition of Commissioner of Social Services,* 120 Misc. 2d 567, 466 N.Y.S.2d 194 (N.Y. Fam. Ct. 1983) (no Free Exercise violation where individual did not suggest doctrinal basis for refusal to submit to blood test). *But cf., Int'l Ass'n of Machinists and Aerospace Workers v. Boeing Co.,* 833 F.2d 165 (9th Cir. 1987) (NLRA exempts only employees who are members of established sects that have historically opposed union membership); *EEOC v. Chrysler Corp.,* 652 F. Supp. 1523, 1529 (N.D. Ohio 1987) (no Title VII violation where employee failed to establish that refusal to work on Sunday was based on tenet of religious

group).

A few courts that have considered the issue have correctly applied the Free Exercise clause to individuals who were not members of a particular religious group. One such court was the Ohio Supreme Court. In the case of *In re Milton*, 505 N.E.2d 255 (Ohio), *cert. denied*, 108 S.Ct. 79 (1987), the court held that the state could not compel a legally competent adult to submit to medical treatment in violation of her religious belief in faith healing. In the course of its opinion, the court rejected the state's argument that Ms. Milton's beliefs were not entitled to protection because she was not a member "of any specific religious denomination or sect" and was not being treated "in accordance with a recognized method of healing." *Id.* at 259. The court stated, "Absent the most exigent circumstances, courts should never be a party to branding a citizen's religious views as baseless on the grounds that they are non-traditional, unorthodox, or at war with what the state or others perceive as reality." *Id.* at 260.

A federal district court recently extended the protections of the Free Exercise clause to individuals who were not members of a distinct religious group. The plaintiffs in *Sherr v. Northport-East Northport Union Free School District*, 672 F. Supp. 81 (E.D.N.Y. 1987), were pantheists who wished to have their children exempted from the inoculations required in New York. The statute that required the inoculations exempted only children whose parents were "bona fide members of a recognized religious organization" opposed to inoculations. *Id.* at 83. The district court heid that the restriction to members of recognized religious organizations was a violation of both the Establishment and Free Exercise clauses. *Id.* at 88-91. *Accord, Maier v. Besser*, 73 Misc. 2d 241, 341 N.Y.S.2d 411 (N.Y. Sup. Ct. 1972) (allowing statutory exemption to parent who was not a member of religious group, but who had sincere religious belief "substantially similar" to the Christian Scientist faith); *cf., Leahy v. District of Columbia*,

646 F.Supp. 1372, 1374-75 (D.D.C. 1986) (belief that Social Security number is "mark of the Beast" warned against in Bible accepted as religious), *rev'd on other grounds*, 833 F.2d 1046 (D.C. Cir. 1987); *Gregersen v. Blume*, 743 P.2d 88, 91 (Idaho Ct. App. 1987) (accepting individual's personal theocratic theory of government as religious).

Closely allied to the problems of individuals who are not members of distinct religious organizations is the plight of those who are members of such associations, but whose beliefs differ to some degree from, or are not mandated by, those of the group. Most state courts that have considered the issue have turned *Thomas* on its head by excepting such atypical individuals from the Free Exercise clause. The Court of Appeals of Arkansas, for example, cited *Thomas* and then completely disregarded its holding in order to deny First Amendment protection to a Jehovah's Witness who lost his job after he attended a religious convention for members of his denomination. *Haig v. Everett*, 8 Ark. App. 255, 650 S.W.2d 593 (1983). The court distinguished *Thomas* on the ground that "[h]ere, the appellant's desire to attend the religious convention was not a 'cardinal principle of' or 'conduct mandated by' his religion [i.e., religious sect]." *Id.* at 595.

Other courts have reached similar decisions, perhaps less egregious in terms of legal analysis, but just as distressing to the religious individuals involved. *See, Herning v. Eason*, 739 P.2d 167 (Alaska 1987) (church presented no evidence that a tenet of the Baptist faith precludes proxy voting); *Koolau Baptist Church v. Department of Labor and Industrial Relations*, 718 P.2d 267, 272 (Hawaii 1986) (church failed to cite religious tenet in claiming exemption from statute); *State ex rel. Pringle v. Heritage Baptist Temple*, 236 Kan. 544, 693 P.2d 1163 (1985) (church unable to show that independent Baptist doctrine mandates day-care centers); *Essex County Division of Welfare v. Harris*, 189 N.J. Super. 479, 460 A.2d 713 (1983) (refusal to give blood sample not tenet of Christian Science

Church); *State v. Chambers,* 477 A.2d 110 (Vt.) (defendant failed to show that tenets of church prohibited autopsy before burial), *cert. denied and appeal dismissed,* 469 U.S. 875 (1984).

The federal courts that have considered this issue have recognized the Free Exercise claim. *Martinelli v. Dugger,* 817 F.2d 1499, 1504 n. 17 (11th Cir. 1987) (Free Exercise clause not inapplicable if beliefs "only loosely supported by the teachings of the religion" or if "only a minority of the members of the religion adhere to a particular religious practice"), *cert. denied,* 108 S. Ct. 714 (1988); *Dettmer v. Landon,* 799 F.2d 929, 932 (4th Cir.) (rites protected even though not required by Church of Wicca), *cert. denied,* 107 S.Ct. 3234 (1986); *Callahan v. Woods,* 658 F.2d 679, 685 (9th Cir. 1981) (views regarding social security numbers as "mark of the Beast" held religious even though other members of church possibly differed); *Lewis v. Califano,* 616 F.2d 73, 79 (3d Cir. 1980) ("an individual's belief [in faith healing], not adopted by, but consistent with the view of his [church], is a religious belief protected by the First Amendment"); *Furquan v. Georgia State Board of Offender Rehabilitation,* 554 F. Supp. 873 (N.D. Ga. 1982) (growing of beard held religious practice even though not required by Muslim faith).

Some states have also recognized that the Free Exercise clause provides protection for religious beliefs not mandated by an established sect. *Dotter v. Maine Employment Security Commission,* 435 A.2d 1368 (Me. 1981) (attendance at religious festival held religious although not required by sect); *State v. Rivinius,* 328 N.W.2d 220, 225 (N.D. 1982) (opposition to state certification of teachers held religious even though beliefs of individuals might differ), *cert. denied,* 460 U.S. 1070 (1983); *Dupont v. Employment Division,* 80 Or. App. 776, 723 P.2d 1073 (1986) (attendance at religious convention protected by Free Exercise clause even though not mandatory). The fact remains, however, that the state courts are split with each other and with the federal courts over this issue.

The importance of the First Amendment in American society cannot be overstated. Including a specified protection of religious exercise in a national constitution was an unprecedented, bold experiment. In framing the parameters of that protection, however, this Court has never established definite standards for determining what beliefs are religious and, therefore, protected by the Free Exercise clause. As a result, many state courts have excluded legitimate religious beliefs from the First Amendment, in the process constricting the freedom of religious exercise protected by the Constitution. The decision of the Illinois Appellate Court in this case, with its refusal to recognize belief in the tenets of Christianity as deserving First Amendment protection unless such belief is an established tenet of a religious organization to which the adherent belongs, is simply the latest in a series of such cases. Given the importance of the questions, and the numerous times they arise in courts throughout the country, these are issues that must eventually be settled by the United States Supreme Court. The instant case will provide an opportunity for the Court to provide further clarification concerning the standards for protected religious belief and to resolve the conflict between the various state courts and the state and federal courts as to whether an individual must be a member of an established religious body and his or her belief an established tenet of such a body to obtain First Amendment protection.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

John W. Whitehead
Counsel of Record
David A. French
Deborah A. Ausburn
THE RUTHERFORD INSTITUTE
P. O. Box 510
Manassas, VA 22110
(703) 369-0100
Counsel for Appellant

May 2, 1988

APPENDIX

Illinois Unemployment Insurance Act, Section 603; Ill. Ann. Stat. ch. 48, par. 433 (Smith-Hurd 1986).

§ 603. Refusal of work. An individual shall be ineligible for benefits if he has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the Director, or to accept suitable work when offered him by the employment office or an employing unit, or to return to his customary self-employment (if any) when so directed by the employment office or the Director. Such ineligibility shall continue for the week in which such failure occurred and, thereafter, until he has become reemployed and has had earnings equal to or in excess of his current weekly benefit amount in each of four calendar weeks which are either for services in employment, or have been or will be reported pursuant to the provisions of the Federal Insurance Contribution Act[1] by each employing unit for which such services are performed and which submits a statement certifying to that fact.

In determining whether or not any work is suitable for an individual, consideration shall be given to the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.

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[1] 26 U.S.C.A. § 3101 et seq.

Notwithstanding any other provisions of this Act, no work shall be deemed suitable and benefits shall not be denied under this Act to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

If the position offered is vacant due directly to a strike, lockout, or other labor dispute; if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; if, as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization; if the position offered is a transfer to other work offered to the individual by the employing unit under the terms of a collective bargaining agreement or pursuant to an established employer plan, program, or policy, when the acceptance of such other work by the individual would require the separation from that work of another individual currently performing it. Amended by P.A. 82-22, § 1, eff. Oct. 1, 1981.

Filed April 20, 1988

IN THE APPELLATE COURT
THIRD JUDICIAL DISTRICT
STATE OF ILLINOIS

WILLIAM A. FRAZEE,	)
	)
Appellant,	)
	)
v.	)No.3860842
	)
DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD, Director of the Illinois Department of Employment Security; and BRUCE W. BARNES, Chairman, Board of Review, and KELLY SERVICES,	)
	)
Appellees.	)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that William A. Frazee, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Appellate Court, Third Judicial District, of the State of Illinois, affirming denial of unemployment benefits to Appellant, entered in this action on August 13, 1987.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ John W. Whitehead

John W. Whitehead
Counsel of Record for Appellant
David A. French
Deborah A. Ausburn
The Rutherford Institute
9411 Battle Street
Manassas, Virginia 22110
(703) 369-0100

PROOF OF SERVICE

The undersigned certifies that three copies of the Notice of Appeal to the Supreme Court of the United States were served upon Neil F. Hartigan, Roma Jones Stewart, and Diane M. Curry, the attorneys of record for Appellees, and Kelly Services, Inc., Appellees, in the above-entitled cause, by enclosing the same in an envelope addressed to them at their business addresses, to wit:

Neil F. Hartigan
Attorney General,
Roma Jones Stewart,
Attorney General,
Diane M. Curry,
Assistant Attorney General,
100 W. Randolph Street
12th Floor
Chicago, Illinois 60601
Kelly Services, Inc.
GPO Box 1179
Detroit, Michigan 41266

and by depositing same with first-class postage full prepaid in a United States Post Office mailbox in Manassas, Virginia at approximately 5:00 p.m. on April 19, 1988.

/s/ Deborah A. Ausburn

Deborah A. Ausburn
Attorney for Appellant
The Rutherford Institute
9411 Battle Street
Manassas, Virginia 22110
(703) 369-0100

Filed April 20, 1988

CIRCUIT COURT OF THE TENTH JUDICIAL
CIRCUIT OF ILLINOIS
PEORIA COUNTY

WILLIAM A. FRAZEE,	)
	)
Appellant,	)
	)
v.	)No.85MR69
	)
DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD, Director of the Illinois Department of Employment Security; and BRUCE W. BARNES, Chairman, Board of Review, and KELLY SERVICES,	)
	)
Appellees.	)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that William A. Frazee, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Appellate Court, Third Judicial District, of the State of Illinois, affirming denial of unemployment benefits to Appellant, entered in this action on August 13, 1987.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ John W. Whitehead

John W. Whitehead
Counsel of Record for Appellant
David A. French
Deborah A. Ausburn
The Rutherford Institute
9411 Battle Street
Manassas, Virginia 22110
(703) 369-0100

PROOF OF SERVICE

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/s/ Deborah A. Ausburn

Deborah A. Ausburn
Attorney for Appellant
The Rutherford Institute
9411 Battle Street
Manassas, Virginia 22110
(703) 369-0100

66057

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706

February 3, 1988

Mr. Daniel J. Smith
Prairie State Legal Services, Inc.
414 Hamilton Blvd., S#301
Peoria, IL 61602

No. 66057 - William A. Frazee, petitioner, v. Illinois Department of Employment Security, etc., et al., respondents. Leave to appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 25, 1988.

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT
OTTAWA

3-86-0842

Frazee v. IL Dept. of Empl. Security

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the year of our Lord one thousand nine hundred and eighty-seven, within and for the Third District of Illinois:

Present -

HONORABLE TOBIAS BARRY, Presiding Justice X

HONORABLE ALLAN L. STOUDER, Justice

HONORABLE WILLIAM B. WOMBACHER, Justice X

HONORABLE JAMES D. HEIPLE, Justice

HONORABLE ALBERT SCOTT, Justice X

JOSEPH FENNESSEY, Clerk

BE IT REMEMBERED, that afterwards on August 13, 1987 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following viz:

No. 3-86-0842

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 1987

WILLIAM A. FRAZEE,

Plaintiff-Appellant,

vs.

ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD, Directory of the Illinois Department of Employment Security; BRUCE W. BARNES, Chairman, Board of Review,

Defendants-Appellees,

and

KELLY SERVICES,

Defendant.

)Appeal from the
)Circuit Court of
)Peoria County
)Honorable
)Robert E. Manning,
)Judge Presiding

JUSTICE SCOTT delivered the opinion of the court:

This is an appeal from an order of the circuit court of Peoria County which affirmed a decision of the defendant Illinois Department of Employment Security which determined that the plaintiff, William A. Frazee, should be disqualified from receiving unemployment benefits due to his refusal to work.

The decision of the Board of Review of the Department of Employment Security capsulizes the facts which led to this appeal. The pertinent part of that decision is as follows:

"In this case, the evidence established that the claimant refused an offer of suitable work without good cause, as his personal desire, no matter how strong or sincere (sic) held, did not constitute good cause for his refusal of work. When a refusal of work is based on religious convictions, the refusal must be based upon some tenets or dogma accepted by the individual of some church, sect, or denomination, and such a refusal based solely on an individual's personal belief is personal and noncompelling and does not render the work unsuitable. It is not the purpose of the Act nor of the Board of Review to abridge or to deny the claimant's constitutional right to the free exercise of religion by imposing a disqualification from benefits. However, other than his own self-serving testimony, the claimant has presented no corroborative evidence to establish that working on a Sunday was unsuitable for him. The claimant's contention that, subsequent to his refusal, he learned that his schedule could have been adjusted, is pure hearsay and conjecture and is of no evidentiary weight."

We have presented for determination in this appeal the question of whether the plaintiff's personal professed religious belief that he could not work on Sundays constituted good cause for his refusal of work.

In support of his contention that his refusal to work on Sunday because of his personal religious belief constituted good cause the plaintiff cites a number of cases. We direct our attention to three United States Supreme Court cases, namely, *Thomas v. Review Board* (1981), 450 U.S. 707, 67 L.Ed.2d 624, 101 S. Ct. 1425; *Sherbert v. Verner* (1963), 374 U.S. 398, 10 L.Ed.2d 965, 83 S.Ct. 1790; and *Hobbie v. Unemployment Compensation Appeals Commission of Florida* (1987), _____ U.S. _____, _____ L.Ed.2d _____, _____ S. Ct. _____, 55 L.W. 4208.

An examination of the cases discloses that in *Thomas* the claimant was a Jehovah's Witness who quit his employment when he was assigned to a department which produced turrets for military tanks. The supreme court of Indiana found the claimant to be ineligible for unemployment compensation. This determination was overturned by the United States Supreme Court on the grounds that the claimant's religious beliefs were entitled to First Amendment protection. In *Thomas* the court made the following observation:

> "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or *where it denies*

> *such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."*
> 450 U. S. at 717-718. (Emphasis added)

The *Sherbert* case involved a Seventh Day Adventist who was discharged by her employer for her refusal to work on Saturday, the sabbath day of her faith. Her application for unemployment compensation benefits from the State of South Carolina was denied. The United States Supreme Court reversed the supreme court of South Carolina on the grounds that denial of unemployment compensation benefits to a Seventh Day Adventist restricted the free exercise by the claimant of her religious beliefs. The United States Supreme Court in reaching such a decision stated:

> "Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forgo that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a

> choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Sherbert v. Verner* (1963), 374 U.S. 398, _____, 10 L.Ed.2d 965, 970-971, 83 S. Ct. 1790, _____.

An examination of the United States Supreme Court opinion in *Hobbie* discloses that the claimant Hobbie, after 2 1/2 years of employment at the jewelry store, informed her immediate supervisor that she was to be baptized into the Seventh Day Adventist Church and that for religious reasons she would no longer be able to work on her sabbath, from sundown on Friday to sundown on Saturday. The claimant was ultimately discharged and denied unemployment compensation benefits by the State of Florida. The United States Supreme Court reversed the denial and in so doing relied upon its prior decision in the cases of *Thomas* and *Sherbert.*

Our examination of the foregoing cases reveals that a common thread was running through each case, namely, that in each case the claimant was a member of an established religious sect or church; that each of the claimants in refusing to work at a particular place or time was exercising what was believed to be a tenet, belief or teaching of an established religious body.

In the instant case the plaintiff does not claim that his refusal to work on Sunday is based upon any tenet of a church or religious body. He takes the position that he is a Christian

and as such he feels it wrong to work on Sunday.

The dividing line between the plaintiff in the instant case and the claimants in the cases of *Thomas, Sherbert* and *Hobbie* may be a thin and fragile line, however, it is a dividing line which we deem significant.

We do not question the sincerity of the plaintiff. Historically the Christians gave Sunday to the world as a holy day in the 4th century (A.D. 321 - decree of Roman Emperor Constantine). However, Sunday and the sabbath are not synonomous. For Christians Sunday is the first day of the week. Sabbath day for the Jewish people is Saturday, the last day of the week, and for the Moslems the sabbath is Friday. The idea that a day was to be set aside for worship, rest and relaxation from the daily rigors appears early in the history of man. "On the sixth day God completed all the work he had been doing, and on the seventh day he ceased from all his work. God blessed the seventh day and made it holy, because on that day he ceased from all the work he had set himself to do." Holy Bible, Genesis 2.

In 1490 B.C. (circa) the people of Israel found a man gathering sticks in the wilderness on the Sabbath day. Those who found him brought him before Moses and Aaron and to all the congregation. He was ordered to be stoned to death and he was. Holy Bible, Numbers 15.

Moses in receiving the ten commandments related them to the Israelites in Transjordan in the wilderness, the fourth commandment being, "Keep the sabbath day holy as

the Lord your God commanded you." Holy Bible, Deuteronomy 5.

The biblical mandates regarding the sabbath day were referring to Saturday, the last day of the week, however, such practice and precedent was followed by the Christians who adopted Sunday as their sabbath day.

From the beginning of the colonization of America the Colonies and the States enacted laws regarding what could and what could not be done on Sunday. The process was slow but the day evolved from one not only devoted to religion but also to one of rest. Each of our thirteen American Colonies had laws which regulated what should be done on Sunday. The first "blue laws" were probably enacted by the New Haven Colony in 1656. Nearly all the blue laws prohibited all work on Sunday except works of necessity and charity. American pioneers had little choice but to ignore the so-called "blue laws" which prohibited work on Sunday. It was necessary to work continuously in order to survive. As the pioneers crossed the mountains into the Western lands, the blue laws were ignored.

There are still "blue laws" on the books of many of our States prohibiting certain business, recreation, and other activity, however, our way of life has resulted in the same being ignored and unenforced.

What would Sunday be today if professional football, baseball, basketball and tennis were barred. Today Sunday is not only a day for religion, but for recreation and labor, Today the supermarkets are open, service stations dispense fuel, utilities continue to serve the people and factories continue to

belch smoke and tangible products. Our own State has only one current Sunday closing law, being the law which bans automobile sales on Sunday, a regulation which for financial reasons has been supported by the majority of the automobile dealers. Efforts to repeal the law have been unsuccessful.

We delve into the history of the significance of Sunday as to the activities permitted in order to illustrate that from a day designated as a holy day it has evolved into a day of also permitting rest, recreation, business, industry and labor. Such a change is not surprising, but on the contrary is dictated by the American way of life. If all Americans were to abstain from working on Sunday, chaos would result.

The assertion by one that as a Christian he or she does not have to accept employment which entails Sunday working and that such refusal will not affect the right to receive unemployment compensation benefits is not supported by the law of our State. As heretofore stated, the injunction against Sunday labor must be found in a tenet or dogma of an established religious sect. The plaintiff in this case does not profess to be a member of any such sect.

For the reasons set forth the judgment of the circuit court of Peoria County is affirmed.

Affirmed.

STATE OF ILLINOIS,)
APPELLATE COURT,) ss.
THIRD DISTRICT,)

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of August in the year of our Lord one thousand nine hundred and eighty seven.

/s/ Joseph Fennessey

Clerk of the Appellate Court

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
OF ILLINOIS
PEORIA COUNTY

WILLIAM A. FRAZEE,	)	
	)	
Plaintiff,	)	
vs.	)	CASE NO. 85-MR-69
	)	
ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, et al.,	)	
	)	
Defendant.	)	

ORDER

Now comes for hearing the complaint of Plaintiff to review the administrative decision entered by the Illinois Department of Employment Security; Plaintiff is present through his attorney, Daniel J. Smith, Defendant is present through its attorney, Dianna Dentino-Zimmerman, Special Assistant Attorney General.

The Court having now fully considered the record filed herein by the Illinois Department of Employment Security together with the arguments of counsel based thereon, finds that the decision of the Illinois Department of Employment Security denying benefits to the Plaintiff was not contrary to law nor against the manifest weight of the evidence and should thereby be affirmed.

It is hereby Ordered that the decision of the Board of Review of the Illinois Department of Employment Security be, and the same is affirmed.

Order entered 11-18-86.

/s/ Robert E. Manning

JUDGE OF THE TENTH JUDICIAL CIRCUIT

STATE OF ILLINOIS
DEPARTMENT OF EMPLOYMENT SECURITY

(536)
BOARD OF REVIEW L.O. 33

IN THE MATTER OF: DECISION NO.: 85-BRD-02119
CLAIMANT: William A. Frazee
(Appellant) 1512 E. Gardner Ln #3 APPEAL DOCKET NO.:
Peoria Heights, IL ABR-84-8357
61614

(AR-84D-51544)

SOCIAL SECURITY NO.:
014-34-0755

TYPE OF APPEAL: Refusal of Work

EMPLOYER: Kelly Services
(Respondent) GPO Box 1179
Detroit, MI 48266

DECISION

This is an appeal by the claimant from a decision of the Referee dated July 23, 1984, which affirmed the determination of the Claims Adjudicator and held the claimant refused an offer of suitable work without good cause and was subject to a disqualification of benefits under the provisions of Section 603 of The Illinois Insurance Act from April 29, 1984, and thereafter until he has become reemployed and has had earnings equal to or in excess of his current weekly benefit amount in each of four calendar weeks.

We have carefully reviewed the record of the evidence in this matter, including the transcript of the testimony submitted before the Referee at a hearing conducted on June 20, 1984, at Peoria, Illinois at which the claimant appeared. We have also carefully considered the arguments and contentions

set forth by the appellant in support of this appeal. The record adequately sets forth the evidence and the arguments of the parties so that no further evidentiary proceedings are deemed necessary.

The record discloses that on April 30, 1984, the claimant received an offer of work from the employer's placement service. The proffered work was to pay $3.40 per hour and was to last from Wednesday May 15, 1984 through Sunday, May 20, 1984. The claimant testified that he inquired if he could accept the job only through Saturday, as due to his personal religious convictions, he does not work on Sundays. He stated that he was told that he must work all five days or he could not be considered for hire and he then refused the offer. He stated that he learned after the fact from the employer that an adjustment in his schedule could have been made had he accepted the job, as was done for other workers, but he based his refusal on the information that he would be required to work on a Sunday. The claimant testified that his refusal to work on Sundays was not based upon any specific religious or church tenet but "just as a Christian, I feel it's wrong."

The issue presented by this appeal is whether the claimant refused an offer of suitable work without good cause.

The primary purpose of The Illinois Unemployment Insurance Act is to provide benefits to individuals who are involuntarily unemployed due to the lack of suitable work and for no other reason. It follows that an unemployed individual who refuses an offer of suitable work or who refuses to apply for suitable work when directed to do so by the Director is not involuntarily unemployed because of the lack of suitable work and the Act requires the denial of benefits in such cases.

In this case, the evidence established that the claimant refused an offer of suitable work without good cause, as his personal desire, no matter how strong or sincerely held, did not constitute good cause for his refusal of work. When a refusal of work is based on religious convictions, the refusal

must be based upon some tenets or dogma accepted by the individual of some church, sect, or denomination, and such a refusal based solely on an individual's personal belief is personal and noncompelling and does not render the work unsuitable. It is not the purpose of the Act nor of the Board of Review to abridge or to deny the claimant's constitutional right to the free exercise of religion by imposing a disqualification from benefits. However, other than his own self-serving testimony, the claimant has presented no corroborative evidence to establish that working on a Sunday was unsuitable for him. The claimant's contention that, subsequent to his refusal; he learned that his schedule could have been adjusted, is pure hearsay and conjecture and is of no evidentiary weight.

Accordingly we conclude that the claimant refused an offer of suitable work without good cause, and, therefore, was subject to a disqualification of benefits from April 29, 1984, and thereafter until he requalifies under the provisions of Section 603 of The Illinois Unemployment Insurance Act.

The decision of the Referee is affirmed.

BOARD OF REVIEW
of the
DEPARTMENT OF EMPLOYMENT SECURITY

/s/ Peter J. Miller

BRUCE W. BARNES, Chairman

/s/ Edward Mc Broom

EDWARD MC BROOM, Member

/s/ Bruce W. Barnes

PETER J. MILLER, Member

Dated and Mailed at Chicago, Illinois Mar. 22, 1985.

MOTION

(2)

No. 87-1945

In The

Supreme Court of the United States

October Term, 1987

WILLIAM A. FRAZEE,

Appellant,

v.

DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD, Director of the Illinois Department of Employment Security; BRUCE W. BARNES, Chairman, Board of Review; and KELLY SERVICES,

Appellees.

On Appeal From The Appellate Court Of Illinois, Third Judicial District

MOTION OF STATE APPELLEES TO DISMISS OR AFFIRM

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROBERT J. RUIZ
Solicitor General, State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3312

Attorneys for State Appellees

Rosalyn B. Kaplan *
Diane Curry Grapsas
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3698

Of Counsel

* Counsel of Record

Printed by Authority of the State of Illinois (P.O. 34136—55—6-30-88)

12 pp

QUESTION PRESENTED

Whether a state agency violates the Free Exercise Clause of the First Amendment by denying an individual unemployment benefits due to his refusal to work on a Sunday, when that refusal is not based upon any specific religious or church tenet but rather upon his allegation of a personal feeling that, as a Christian, it was wrong for him to work on Sundays.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM A. FRAZEE,

Appellant,

v.

DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD, Director of the Illinois Department of Employment Security; BRUCE W. BARNES, Chairman, Board of Review; and KELLY SERVICES,

Appellees.

On Appeal From The Appellate Court Of Illinois, Third Judicial District

MOTION OF STATE APPELLEES TO DISMISS OR AFFIRM

The State Appellees, DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois, SALLY WARD, Director of the Illinois Department of Employment Security, and BRUCE W. BARNES, Chairman, Board of Review, move this Court to dismiss this appeal or to affirm the judgment of the Illinois Appellate Court, for want of a substantial federal question.

STATEMENT OF FACTS

The appellant, William A. Frazee (hereafter "the claimant"), was an unemployed clerical worker who was receiving unemployment insurance benefits until they were discontinued based upon a determination that he refused an offer of suitable work without good cause (R. C17).* During an administrative hearing, at which the claimant appeared *pro se*, he testified that he declined to accept temporary employment that would have required him to work on a Sunday. The following exchange took place between the hearing referee and the claimant (R. C35-36):

Q. Why can't you work on Sunday?

A. It's just against my faith.

Q. What faith is that?

A. I'm a Christian.

Q. Well, I get–

A. Well, I'm a Christian as–

Q. What church you [sic] belong to?
Is that one of your tenets on the church–

A. No. It's–

Q. – not to work on Sunday?

A. – just as a Christian, I feel it's wrong–

Q. Oh, you mean yourself?

A. Yes.

* "R.C." refers to the certified record filed with the Illinois Appellate Court. "J.S." refers to the Jurisdictional Statement of the appellant; "J.S. App." refers to the Appendix to that Jurisdictional Statement.

Q. Or as a Christian?
I'm saying, it is not the tenets of your church, that you don't work on Sunday.

A. No.

Q. But as a Christian yourself, you feel you shouldn't work on Sunday?

A. Not in a job such as this, whereby, profit is involved.
An essential service job such as where life is at stake, I have no objections to that.

The referee concluded that the "claimant refused an offer of suitable work without good cause" and that "the claimant has not established that the work was unsuitable for him." (R. C49).

The claimant appealed that decision to the Board of Review, Department of Employment Security, which issued the final administrative decision in this case. (J.S. App. at 21a). The Board observed that "[t]he claimant testified that his refusal to work on Sundays was not based upon any specific religious or church tenet but "just as a Christian, I feel it's wrong." (J.S. App. at 22a). It concluded (J.S. App. at 22a-23a):

> In this case, the evidence established that the claimant refused an offer of suitable work without good cause, as his personal desire, no matter how strong or sincerely held, did not constitute good cause for his refusal of work. When a refusal of work is based on religious convictions, the refusal must be based upon some tenets or dogma accepted by the individual of some church, sect, or denomination, and such a refusal based solely on an individual's personal belief is personal and noncompelling and does not render the work unsuitable. It is not the purpose of the Act nor of the Board of Review to abridge or to deny the claimant's constitutional right to the free

> exercise of religion by imposing a disqualification from benefits. However, other than his own self-serving testimony, the claimant has presented no corroborative evidence to establish that working on a Sunday was unsuitable for him.

Accordingly, the claim for benefits was denied.

This decision was upheld on judicial review by the Circuit Court of Peoria County, Illinois (J.S. App. at 20a) and, subsequently, by the Illinois Appellate Court, Third District. (J.S. App. at 11a). Claimant was represented by counsel during all judicial proceedings.

ARGUMENT

BECAUSE THE BOARD OF REVIEW MADE NO FINDING THAT CLAIMANT'S REFUSAL TO WORK WAS BASED UPON "A SINCERELY-HELD RELIGIOUS CONVICTION," THE QUESTION RAISED BY THIS APPEAL LACKS SUFFICIENT BASIS IN THE RECORD TO WARRANT PLENARY CONSIDERATION BY THIS COURT.

The appeal which the claimant brings before this Court is premised on the Appellate Court's alleged error in "refus[ing] to recognize belief in particular tenets of Christianity as deserving first amendment protection." (J.S. at 9). The claimant overlooks the fact that the Board of Review based its decision on his own testimony that his rejection of Sunday work "was not based upon any specific religious or church tenet. . . ." (J.S. App. at 22a). As a result of this testimony, the Board concluded that claimant's refusal of work was based upon his personal desire, rather than a tenet of Christianity. (J.S. App. at 22a).

Consideration of claimant's argument in this Court requires an acceptance of his assertion that his refusal of a job offer was due to his sincerely held religious conviction. Yet, the record is devoid of any administrative finding regarding the source, extent or sincerity of his asserted belief.*

Although the claimant's testimony was, indeed, "uncontroverted," it remained the duty of the administrative body to evaluate his credibility and to make findings of fact based on the credible evidence of record. *Dotson v. Bowling*, 102 Ill. App. 3d 340, 430 N.E.2d 44 (1st Dist. 1981). To the extent that the claimant's *pro se* appearance at that level might have hampered his presentation, any deficiencies in the administrative record could have been remedied through a request for remand directed to the circuit court, where the claimant was represented by counsel. *Lærgner v. State Employees Retirement System*, 97 Ill. App. 3d 483, 423 N.E.2d 536 (3d Dist. 1981); *Appel v. Zoning Board of Appeals*, 120 Ill. App. 2d 401, 257 N.E. 2d 9 (4th Dist. 1970). *See* Ill. Rev. Stat. ch. 110, ¶ 3-111(a)(7) (1985). However, no such request was made.

The judicial review by the circuit and appellate courts was necessarily confined to the record made before the agency, with the factual findings and conclusions of the agency being prima facie true and correct. Ill. Rev. Stat. ch. 110, ¶ 3-110 (1985). Claimant's assertion that the appellate court "declined to accept his belief as religious" (J.S. at 9) is misleading; that court was not free, under Illinois law, to make its own findings of fact regarding claimant's

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* Despite his reference to "the particular Christian sect to which he belongs" (J.S. at 10), the record does not demonstrate that claimant is a member or follower of *any* sect.

beliefs. *Ryan v. Verbic*, 97 Ill. App. 3d 739, 423 N.E.2d 534 (2d Dist. 1981). Moreover, its review of the historical practice of keeping a sabbath day does not justify claimant's position, but serves only to demonstrate: 1) the court's inability to identify abstinence from Sunday work as a current tenet of Christianity; and 2) the apparent absence of a biblical mandate to honor Sunday, the first day of the week, as a holy day of rest and worship.

Given the current posture of this case, it cannot be meaningfully compared even to those cases where, claimant asserts, courts "have correctly applied the Free Exercise clause to individuals who were not members of a particular religious group." (J.S. at 12). Such cases still require demonstration of the sincerity of a claimant's beliefs, *see, e.g., Sherr v. Northport-East Northport Union Free School District*, 672 F. Supp. 81, 94-97 (E.D.N.Y. 1987), and may ultimately depend upon the recognition of the particular beliefs by an identified religious sect. *Id.* at 96-97. *See also Maier v. Besser*, 73 Misc. 2d 241, 341 N.Y.S. 2d 411 (Sup. Ct. 1972). Moreover, in view of the lack of evidence to show that claimant belongs to any particular church, he is not similarly situated to those whose beliefs are consistent with, if not mandated by, the teachings of their sect. *See, e.g., Lewis v. Califano*, 616 F.2d 73 (3d Cir. 1980).

In sum, the question presented by the claimant in his Jurisdictional Statement to this Court assumes facts and conclusions which are not warranted by the evidence of record. Therefore, the Court should conclude that plenary consideration of this case is not required.

CONCLUSION

WHEREFORE, the State appellees respectfully move this Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Appellate Court of Illinois.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

ROBERT J. RUIZ
Solicitor General, State of Illinois

100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3312

Attorneys for State Appellees

ROSALYN B. KAPLAN *
DIANE CURRY GRAPSAS
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3698

Of Counsel * Counsel of Record

REPLY

BRIEF

No. 87-1945

IN THE

Supreme Court of the United States

October Term, 1987

WILLIAM A. FRAZEE,

Appellant,

v.

DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD, Director of the Illinois Department of Employment Security; and BRUCE W. BARNES, Chairman, Board of Review, and KELLY SERVICES,

Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS FOR THE THIRD DISTRICT

APPELLANT'S BRIEF OPPOSING MOTION OF STATE APPELLEES TO DISMISS OR AFFIRM

John Whitehead
Counsel of Record
David A. French
Deborah A. Ausburn
THE RUTHERFORD INSTITUTE
9411 Battle Street
Manassas, Virginia 22110
(703) 369-0100

July 13, 1988

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MISCELLANEOUS

IN THE

Supreme Court of the United States

October Term, 1987

WILLIAM A. FRAZEE,

Appellant,

v.

DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD, Director of the Illinois Department of Employment Security; and BRUCE W. BARNES, Chairman, Board of Review, and KELLY SERVICES,

Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS FOR THE THIRD DISTRICT

APPELLANT'S BRIEF OPPOSING MOTION OF STATE APPELLEES TO DISMISS OR AFFIRM

The State Appellees contend that the question of whether Appellant's beliefs were "religious" or merely "personal" is an issue of fact that was resolved by the Board of Review, Department of Employment Security (hereinafter "Board"), and not subject to review by any appellate court. In raising this new issue, State Appellees misconstrue both the evidence and Appellant's argument.

Appellant does not dispute the factual findings of the Board of Review or the Illinois Appellate Court. He asks only that this Court reverse the erroneous legal conclusion of the Illinois Appellate Court that Appellant's religious beliefs are not entitled to first amendment protection because they are not held by an established religious organization.

The record fully demonstrates that the dispute in the within cause concerns a matter of law and is therefore subject to review by the Court. For example, there is no issue of fact concerning the sincerity of Appellant's religious beliefs. The Board of Review did not determine Appellant to be insincere in his belief that work on Sunday would violate his Christian faith. Rather, it declined to accept his beliefs as religious "no matter how strong or sincerely held" (J.S. App. 22a).[1] The Illinois Appellate Court drew a stronger inference from the record, stating, "We do not question the sincerity of the plaintiff." *Frazee v. Dept. of Employment Security*, 159 Ill. App. 3d 474, 477, 512 N.E.2d 789, 791 (1987); J.S. App. 15a. This Court, then, need not make a plenary review of the record to determine whether appellant is sincere; the Illinois court has determined that he is sincere.

Likewise, the record shows that Appellant defended his refusal to work on Sunday by saying, "It's just against my faith" (C.35). When asked which faith, he stated, "I'm a Christian" (C.35). Both the Board of Review and the Illinois Appellate Court recognized that Appellant's beliefs stem from what he perceives to be the requirements of Christianity (J.S. App. 21a, 15a).

Moreover, Appellant does *not* contend that the Board erred in finding that his beliefs were not a tenet of a particular denomination of which he was a member; he contends that such a determination is as a matter of law irrelevant to first amendment analysis. The dispute in this

[1] J.S. App. refers to the Appendix of Appellant's Jurisdictional Statement. C. refers to the Common Law Record, filed with the Illinois Appellate Court.

case, therefore, is not factual. The issue is the validity of the Illinois Appellate Court's new requirement that an individual religious belief be an established tenet of a religious organization in order to obtain first amendment protection.

This new legal requirement is at variance with established first amendment free exercise principles. This Court has required only that a belief be religious rather than philosophical or personal in order to be accorded first amendment protection. *See e.g., Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972).

Thus, Appellant Frazee, in order to claim the protection of the first amendment, need only show that his conviction against Sunday labor is based on his individual religious beliefs. The Court has long recognized that the prohibition against Sunday work is deeply rooted in Christianity. *McGowan v. Maryland*, 366 U.S. 420, 431-33 (1961). The belief has its origin in the Decalogue, which requires that no work be done on the Sabbath. Exodus 20:8-11. Christianity transferred that prohibition from Saturday to Sunday, but retained the characterization of the day as one for worship. *McGowan*, 366 U.S. at 470-77 (Frankfurter, J., concurring). In 1786, for example, the Virginia legislature enacted "A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers" that prohibited certain *Sunday* activities. *Report of the Committee of Revisors Appointed by the General Assembly of Virginia in MDCCLXXVI* 59 (Nov. 1784); *II The Papers of Thomas Jefferson* 555 (Julian Boyd, ed. 1950). In light of this tradition, Appellant's refraining from work on Sunday as a result of his Christian faith can hardly be deemed personal or nonreligious.

Moreover, contrary to State Appellee's argument, the lack of hierarchical or majority approval does not make a belief a non-religious personal one. This Court has clearly stated that "the guarantee of free exercise is not limited to

beliefs which are shared by all of the members of a religious sect." *Thomas v. Review Board,* 450 U.S. 707, 715-16 (1981).

Religious belief may be based on individual reflection and study rather than institutionalized dogma. Even beliefs not yet precisely or fully articulated are accorded first amendment protection. "Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Thomas,* 450 U.S. at 715. Such individual religious beliefs, irrespective of their conformity with beliefs articulated by other persons or groups, are therefore fully within the protection of the First Amendment.

The relevant facts are not in dispute in this appeal. The issue presented is purely one of law, and as such is amenable to adjudication by this Court. Appellant, therefore, respectfully requests that this Court note probable jurisdiction of this appeal.

Respectfully submitted,

John W. Whitehead
Counsel of Record
David A. French
Deborah A. Ausburn
The Rutherford Institute
9411 Battle Street
Manassas, Virginia 22110
(703) 369-0100

Dated July 13, 1988.

JOINT

APPENDIX

No. 87-1945

IN THE

Supreme Court Of The United States

October Term, 1987

WILLIAM A. FRAZEE,

Appellant,

v.

DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD, Director of the Illinois Department of Employment Security; and BRUCE W. BARNES, Chairman, Board of Review, and KELLY SERVICES,

Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS FOR THE THIRD DISTRICT

JOINT APPENDIX

David A. French
Counsel of Record
John W. Whitehead
Deborah A. Ausburn
THE RUTHERFORD INSTITUTE
P.O. Box 510
9411 Battle Street
Manassas, VA 22110
(703) 369-0100
Counsel for Appellant

Neil F. Hartigan,
Attorney General
Robert J. Ruiz,
Solicitor General
Rosalyn B. Kaplan
Counsel of Record
Diane Curry Grapsas
Assistant Attorneys General
STATE OF ILLINOIS
100 West Randolph St.,
12th Floor
Chicago, Illinois 60601
(312) 917-3698
Counsel for Appellee

APPEAL DOCKETED: MAY 3, 1988
PROBABLE JURISDICTION NOTED: OCTOBER 3, 1988

Balmar Legal Publishing Division, Washington, D.C. (202) 659-3610

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PROCEEDINGS

REFEREE: Let the record show that this is Elasko Thigpen, a Hearing Referee for the State of Illinois, opened up the hearing on the Docket Number AR 84D-51544. And this is a timely appeal by the Claimant from determination of Claims Adjudicator holding that the Claimant is subject to disqualification of benefits under Section 603 of the Illinois Unemployment Insurnce Act, and has received benefits subject to Recoupment under the Section 900 of the Act.

This hearing is being conducted at the Unemployment Insurance Office, 228 Northeast Jefferson, Peoria, Illinois. Today's date is June 20, 1984, the time of this hearing is approximately 1:30 p.m.

The Claimant appears. The Employer, Kelly Services, GPO Box 1179, Detroit, Michigan, 48266.

The law requires that all testimony be taken under oath.

Please raise your right hand.

Let the record show that the witness was duly sworn and has answered in the affirmative.

WHEREUPON

WILLIAM FRAZEE

Claimant-Appellant, after having been duly sworn was examined and testified as follows:

EXAMINATION BY REFEREE:

Q. State your name for the record please?

A. My name is William Frazee.

Q. And what is your address?

A. 1512 East Gardner Lane, Number 3, Peoria Heights, Illinois 61614.

Q. What is your Social Security Account Number?

A. 014-340755.

Q. Now.
You have a contract to work through Kelly Services?

A. What do you mean a contract?

Q. Well, verbal or written, where you went through Kelly Services who assigned you to certain jobs, that Kelly Services had.

A. Yes.

Q. Okay.
And how long have you been associated with them?

A. Oh, I don't know. Trying to think when I did the first job -- I think it was -- I think I first worked for them in April. Some time in April.

Q. Of what year?

A. This year, 1984.

Q. 1984?
Now, most of your jobs that you took through them, were they clerical jobs?

A. Not exactly.
The first one I took was an enumerator's job.
I did a bus ridership survey, as far as, where people got on the bus, and where people got off.

Q. That was the same thing, similar, clerical. You took a survey of people --

A. All I did though is punch in numbers into a computer, I did't --

Q. I understand that.

A. -- that's it.

Q. Well, you can call it computer operator if you want, but I think it's in the clerical field.
Were you mostly in the clerical field?

A. Basically, yes.
That's what I did.

Q. Now.
Your last assignment was to what job?

A. I asked them if they had any work. And they said they had a job with, I think the name of it is Designer Warehouse Outlet, which is an outfit somewhere out of state. I don't know if it's from Michigan or Indiana or where.

Q. Was the work here in Peoria?

A. The work was to be here in Peoria, but all they were doing was representing the company.
Recruiting people to work for them when they came.
They are not located in Peoria.

Q. And what was the pay?

A. I think it was to be $3.35 an hour, I'm not positive.

Q. You were close. $3.40
Okay. Now.

A. When I asked them about what they had and they told me that I asked them as to what the hours would be and what days would be included, as far as the work schedule. They told me it would be Wednesday through Sunday.

Q. Wednesday through Sunday?

A. Right.
I asked them if it was possible to work Wednesday through Saturday only. They said, "No," I had to be available all five days, or else I couldn't be considered for hire.

Q. You said that Kelly told you that, you're saying?

A. Right.
And then I said, "Well, if I had to be available Sunday, I can't. As a Christian I can't do that."

Q. Why can't you work on Sunday?

A. It's just against my faith.

Q. What faith is that?

A. I'm a Christian.

Q. Well, I get --

A. Well, I'm a Christian as --

Q. What church you belong to?
Is that one of your tenents on the church --

A. No. It's --

Q. -- not to work on Sunday?

A. -- just as a Christian, I feel it's wrong --

Q. Oh, you mean yourself?

A. Yes.

Q. Or as a Christian?
I'm saying, it is not the tenets of your church, that you don't work on Sunday.

A. No.

Q. But as a Christian yourself, you feel you shouldn't work on Sunday?

A .Not in a job such as this, whereby, profit is involved. An essential service job such as where life is at stake, I have no objections to that.

Q. Okay.
But with a job there would be profit in that too, wouldn't it?

A. Only in if you were getting paid for it --

Q. Like a nurse or doctor?

A. -- but, I mean it's not like an employer is profiting from it. I mean most hospitals are usually a non-profit organization.

Q. Well, it' supposed to but I doubt it.

A. You know, like working for the city, as a policeman or a ambulance driver or fireman. Anyone of those is potentially to preserve or protect life.

Q. Now.

A. I -- you know -- I was available through Saturday.

Q. But you say that Kelly had told you that you had to be available through Sunday, no objection could be made?

A. That's what they told me.

Q. But, I have a statement in the file, where they state that adjustments could have been made if asked.
Did you ask them?
Now, that isn't the exact statement, but --

A. No. They said the Employer made adjustments for other employees.

Q. Right.

A. Now, that's not what they told me.

Q. That's what I'm asking. They didn't tell you that?

A. No. They said -- that is something after the fact. That's not what they told me at the time I talked to them.

Q. At the time you talked to them, they told you that no adjustment could be made?

A. They told me I had to available all five days, or else I couldn't be considered for hire.
I said, "Well on the basis of that, then I have to decline the job."

Q. Okay.
Now our review -- you also worked for the State of Illinois. Do you still work for the State of Illinois as an intermitten?

A. No I don't.
Because I'm layed off due to lack of work.

Q. What I mean, where you still on call?

A. Yes I am.
I have never done that type of work before either, that's why --

Q. What type of work was this?

A. It had something to do with clothing. They were here to sell clothing for these specified number of days. And I guess what I had to do was --

Q. It was retail work?

A. Right.

Q. But, they never did give you the answer to what type of work it was because after you said you asked the hours, and they told you --

A. Asked the hours and the days.

Q. -- and they told you Wednesday through Sunday -- and now -- that's where -- that's what we have in the files --that when they gave you the days, you walked out saying you can't work on the Lord's Day.

A. But, I asked them first, if there was a possibility for that to be changed.
They said, I had to be available all five days.

Q. Okay.

A. It was on that basis, that I declined the job. It was not -- it was not for any other reason.
If they had said right then and there, I could have worked Wednesday through Saturday, and not work Sunday, I would have taken the job.

Q. Okay.
But now you had already certified for benefits. Had you not?

A. Mm, hmm.

Q. And for the weeks ending 5/5, 5/12, and 5/19 --

A. Okay that's --

Q. Wait a minute.

A. Okay. I'm sorry.

Q. -- over which this period is covers.

A. Okay.
That's another thing. The job was not to begin until the week ending, I believe 5/12, and this -- I was

denied benefits the week ending 5/5. I don't see how I can be denied benefits for a week in which the job does not exist.

Q. Okay.
Well then you did receive benefits for those weeks?

A. Yes I did.

Q. Okay.
And this offer was made to you on April 30th, 1984.

A. I believe so. I can't recall the exact date, but I believe that was correct.

Q. That's when the offer was made, on April 30th. I don't know when you were supposed to begin, but it was made --

A. It was -- I was supposed to --

Q. -- on April 30th.

A. -- to the best of my knowledge, I was to begin the following week, on, I believe, it was the 4th.

Q. The 4th of May?

A. Wait a minute. Wait a minute.

Q. Maybe the 11th of May then?

A. I think it was the 11th. Yes. I think it was the 11th.

Q. Well the 11th of May was a Friday, so it had to be either the --

A. Okay, wait a minute.
I'm sorry, I'm sorry --

Q. -- 9th, 10th, 11th --

A. -- I'm looking at 1983, here.

Q That's the wrong -- oh, here --

A. Do you have an 1984 calender?

Q. Yes.

A. I'm sorry.

Q. I guess you were looking at the wrong calender.

A. Looking at the wrong calender.
Okay, so --

Q. On April 30th --

A. I believe it was supposed to start the 9th and it was supposed to go through the 13th.

Q. -- through the 13th.

A. -- If I'm not mistaken.

Q. 9th through the 13th.

A. Those may not be the exact dates.
I know it supposed to end on Sunday, but the exact starting date I'm not sure. I'm -

Q. Okay.
Yes, but it was April the 30th when you were offered --

A. That's when I talked to them.

Q. -- the job and you had talked to Kelly --

A. That's when I talked to them.

Q. -- it was off, the job.

A. That's right.

Q. Okay.
Now --

A. If they'd told me right then and there, you know, "Well, we can make arrangements so you don't have to work on Sunday," I would have taken the job.
But they didn't tell me that. You, know it sounds like to me, they're trying to have their cake and it it too.

Q. Well --

A. First they tell me I have to be available all five days, then they send you a notice saying that adjustments were made for other employees.

Q. But now --

A. That had to be after the fact.

Q. But now -- but it is true though, that these tenets, which you have claimed, are not the tenets of your church, per se, but just of your Christian faith personally.

A. My personal Christian faith in the Lord.

Q. Okay.
Anything else you wish to add.

A. I can't see -- say anything.

Q. Okay.
If nothing more then we will close this hearing.
A decision -- a decision will be rendered based upon what's on this tape and what's in this file.
Now --

A. You know, for me to try to get in touch with the Employer, to find this out, I either would have had to give him a phone call, write him a letter, or wait until they came into the town, which was not for at least another week or two.

Q. Okay.

A. And as I say, at the time, that they told me that I had to be available, all five days.
And then they're telling you that "Adjustments were made for other employees."

Q. Well, that's what they state here.
An indication -- I told you -- they just didn't just come right out and say it. But an indication from what they state here that it appears that when you -- when you were told what days to work, you stated you would not work on Sunday, and walked out, saying, "I can't work on the Lord's day."
And they made a statement that they made adjustments for other people. That indicates --

A. That's true. But that's after the fact.

Q. Okay.

A. That's after the fact.

Q. Alright. Alright.

A. They told me, I had to be available all five -- all the days.

Q. Okay.

A. Okay?

Q. Alright.
It's noted on tape.
Now. A decision will be rendered based upon what's in this record and what's in this file.

You will receive a copy of that decision.

What I'm about to say, has nothing to do with the decision that has to be rendered, but it is my duty and obligation to remind you of your continued appeals rights.

A decision will come out of Chicago, with my signature.

You have a right to appeal that decision to the Board of Review that sits in Chicago, Illinois.

There is no need for you to go to Chicago, nor would it cost anything. Your files appear at the Local Office --

A. I know.

Q. -- which in this instance is Peoria, Illinois, -- I think I'm telling you something you already know -- so, okay, we can forego that, and we will just call it off.

We thank you for coming here today.

WHICH WAS ALL THE EVIDENCE OFFERED, HEARD OR RECEIVED IN THE HEARING OF THE ABOVE ENTITLED MATTER.

/s/ Elasko Thigpen
Hearings Referee

CERTIFICATION:

I hereby certify that I have transcribed a cassette recording of the above proceedings held before Referee Elasko Thigpen, on the twentieth day of June, 1984, and that the foregoing is a true and correct transcription of the cassette recorded proceedings held in the above entitled cause before said Referee Elasko Thigpen.

/s/ Carole Lorenzini
August 23, 1984

STATE OF ILLINOIS-DEPARTMENT OF LABOR
BUREAU OF EMPLOYMENT SECURITY
DIVISION OF UNEMPLOYMENT INSURANCE
REFEREE'S DECISION

IN THE MATTER OF
APPEAL DOCKET NO. AR-84D-51544

CLAIMANT (Appellant)	EMPLOYER
William Frazee 1512 E. Gardner Lane, #3 Peoria Heights, IL 61614	Kelly Services GPO Box 1179 Detroit, MI 48266

SOCIAL SECURITY NO.: 014-34-0755
DATE OF HEARING: June 20, 1984
DATE OF APPEAL:June 11, 1984
PLACE OF HEARING: Peoria, IL
DATE OF MAILING: June 23, 1984
SECTION OF UNEMPLOYMENT INSURANCE ACT:
Section 603 - Refusal of Work
Section 900 - Recoupment
(See Enclosures for Sections of the Act and Appeal Rights)

HISTORY OF THE APPEAL:

The Claimant filed a timely appeal of a determination dated June 11, 1984 which disqualified the Claimant from benefits under Section 603 of the Illinois Unemployment Insurance Act from April 29, 1984, and for each week thereafter until the Claimant has had employment in at least four calendar weeks and has had earnings in each of the weeks that equal or exceed $139.00, which is the Claimant's current weekly benefit amount. The Claimant appeared and testified; the Employer did not appear. The Issue

is whether: the Claimant refused an offer of suitable work without good cause.

FINDINGS OF FACT:

The Claimant certified his eligibility for, and was paid, unemployment benefits from April 29, 1984 to May 19, 1984. On April 30, 1984, the Claimant was offered a job by his Employer (placement service). He refused the offer because he did not want to work on Sunday, which was one of the requirements of the work. The job required five days and the Claimant did not investigate whether he could work the fifth day the following week. He told the Employer he would work four days, Wednesday through Saturday.

CONCLUSION:

The Claimant refused an offer of suitable work without good cause. The Claimant has not established that the work was unsuitable for him.

DECISION:

The determination of the claims adjudicator is affirmed on all issues. The Claimant is disqualified for benefits under Section 603 of the Illinois Unemployment Insurance Act from April 29, 1984 and for each week thereafter until the Claimant has had employment in at least four calendar weeks and has had earnings in each of the weeks that equal or exceed $139.00, which is the Claimant's current weekly benefit amount.

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Elasko Thigpen (536)
Hearings Referee

RIGHT OF FURTHER APPEAL

PLEASE TAKE NOTICE that as a result of a hearing before a Hearings Referee, the decision herein was made and has been duly filed on the mailing date listed on the face of the decision.

This decision will become final, unless WRITTEN NOTICE of appeal from the decision is filed within thirty (30) days from the date of mailing as shown on the decision.

The notice of appeal must be filed at the local employment insurance office where the claim is filed or with the Board of Review, 910 South Michigan Avenue, Chicago, Illinois 60605.

If the last day for filing your appeal is a Saturday or Sunday, or any other day the office is closed, the appeal may be filed on the next day the office is open.

Information relative to appeals and forms may be had upon application to the local unemployment insurance office.

STATE OF ILLINOIS
DEPARTMENT OF EMPLOYMENT SECURITY

BOARD OF REVIEW

(536)
L.O. 33

IN THE MATTER OF: DECISION NO.: 85-BRD-02119

CLAIMANT: William A. Frazee
(Appellant) 1512 E. Gardner Ln #3
Peoria Heights, IL 61614

APPEAL DOCKET NO.:
ABR-84-8357
(AR-84D-51544)

SOCIAL SECURITY NO.:
014-34-0755

TYPE OF APPEAL:
Refusal of Work

EMPLOYER: Kelly Services
(Respondent) GPO Box 1179
Detroit, MI 48266

DECISION

This is an appeal by the claimant from a decision of the Referee dated July 23, 1984, which affirmed the determination of the Claims Adjudicator and held the claimant refused an offer of suitable work without good cause and was subject to a disqualification of benefits under the provisions of Section 603 of The Illinois Insurance Act from April 29, 1984, and thereafter until he has become reemployed and has had earnings equal to or in excess of his current weekly benefit amount in each of four calendar weeks.

We have carefully reviewed the record of the evidence in this matter, including the transcript of the testimony submitted before the Referee at a hearing conducted on June 20, 1984, at Peoria, Illinois at which the claimant appeared. We have also carefully

considered the arguments and contentions set forth by the appellant in support of this appeal. The record adequately sets forth the evidence and the arguments of the parties so that no further evidentiary proceedings are deemed necessary.

The record discloses that on April 30, 1984, the claimant received an offer of work from the employer's placement service. The proffered work was to pay $3.40 per hour and was to last from Wednesday May 15, 1984 through Sunday, May 20, 1984. The claimant testified that he inquired if he could accept the job only through Saturday, as due to his personal religious convictions, he does not work on Sundays. He stated that he was told that he must work all five days or he could not be considered for hire and he then refused the offer. He stated that he learned after the fact from the employer that an adjustment in his schedule could have been made had he accepted the job, as was done for other workers, but he based his refusal on the information that he would be required to work on a Sunday. The claimant testified that his refusal to work on Sundays was not based upon any specific religious or church tenet but "just as a Christian, I feel it's wrong."

The issue presented by this appeal is whether the claimant refused an offer of suitable work without good cause.

The primary purpose of The Illinois Unemployment Insurance Act is to provide benefits to individuals who are involuntarily unemployed due to the lack of suitable work and for no other reason. It follows that an unemployed individual who refuses an offer of suitable work or who refuses to apply for suitable work when directed to do so by the Director is not involuntarily unemployed because of the lack of suitable work and the Act requires the denial of benefits in such cases.

In this case, the evidence established that the claimant refused an offer of suitable work without good cause, as his personal desire, no matter how strong or sincerely held, did not constitute good cause for his refusal of work. When a refusal of work is based on religious convictions, the refusal must be based upon some tenets or dogma accepted by the individual of some church, sect, or denomination, and such a refusal based solely on an individual's personal belief is personal and noncompelling and

does not render the work unsuitable. It is not the purpose of the Act nor of the Board of Review to abridge or to deny the claimant's constitutional right to the free exercise of religion by imposing a disqualification from benefits. However, other than his own self-serving testimony, the claimant has presented no corroborative evidence to establish that working on a Sunday was unsuitable for him. The claimant's contention that, subsequent to his refusal, he learned that his schedule could have been adjusted, is pure hearsay and conjucture and is of no evidentiary weight.

Accordingly we conclude that the claimant refused an offer of suitable work without good cause, and, therefore, was subject to a disqualification of benefits from April 29, 1984, and thereafter until he requalifies under the provisions of Section 603 of The Illinois Unemployment Insurance Act.The decision of the Referee is affirmed.

BOARD OF REVIEW
of the
DEPARTMENT OF EMPLOYMENT SECURITY

/s/ Peter J. Miller
BRUCE W. BARNES, Chairman

/s/ Edward Mc Broom
EDWARD MC BROOM, Member

/s/ Bruce W. Barnes
PETER J. MILLER, Member

Dated and Mailed at Chicago, Illinois Mar. 22, 1985.

IN THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT OF ILLINOIS
PEORIA COUNTY

CASE NO. 85 MR 000069

WILLIAM A FRAZEE,

Plaintiff,

vs.

ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD Director of the Illinois Department of Employment Security; BRUCE W. BARNES, Chairman, Board of Review; and KELLY SERVICES,

Defendants

COMPLAINT FOR ADMINISTRATIVE REVIEW

Plaintiff, WILLIAM A. FRAZEE, by his attorney, SUSAN DAWSON-TIBBITS of PRAIRIE STATE LEGAL SERVICES, INC., complains of Defendants, ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; its Director, SALLY WARD; BRUCE W. BARNES, the Chairman of the Board of Review; and KELLY SERVICES, and alleges as follows:

1. This is an action for judicial review of a final administrative decision rendered by Defendant Barnes as Chairman of the Board of Review of the Illinois Department of Employment Security. This action is brought in accordance with Article III (Administrative Review) of the Illinois Code of Civil Procedure, *Ill.Rev.Stat.*, Ch. 110, Par. 3-101 et *seq*. Jurisdiction is conferred

on this Court pursuant to Par. 3-104 of said Article. This action is timely filed under Par. 3-103 in that Defendants' final administrative decision was issued on March 22, 1985, less than 35 days prior to the filing of this Complaint.

2. Defendant Illinois Department of Employment Security is an administrative agency of the State of Illinois.

3. In June, 1984, Plaintiff was determined ineligible for unemployment insurance benefits from April 29, 1984 and thereafter.

4. On July 23, 1984, that decision was affirmed by a referee of the Illinois Department of Employment Security.

5. Plaintiff appealed the referee's decision, and on March 22, 1985, the Board of Review of the Illinois Department of Employment Security affirmed the referee's decision.

6. The Board of Review's decision, #85-BRD-02119, attached hereto as Exhibit "A" and made a part hereof, is a final administrative decision, and Plaintiff has exhausted all administrative remedies.

7. The pertinent language of the Board of Review's decision is as follows:

> In this case, the evidence established that the claimant refused an offer of suitable work without good cause, as his personal desire, no matter how strong or sincerely held, did not constitute good cause for his refusal of work. When a refusal of work is based on religious convictions, the refusal must be based upon some tenets or dogma accepted by the individual of some church, sect, or denomination, and such a refusal based solely on an individual's personal belief is personal and noncompelling and does not render the work unsuitable. It is not the purpose of the Act nor of the Board of Review to abridge or to deny the claimant's constitutional right to the free exercise of religion by imposing a disqualification from benefits. However, other than his own self-serving testimony, the claimant has presented no corroborative evidence to establish that working on a

Sunday was unsuitable for him. The claimant's contention that, subsequent to his refusal, he learned that his schedule could have been adjusted, is pure hearsay and conjecture and is of no evidentiary weight.

8. The Board of Review's decision that Plaintiff refused an offer of suitable work without good cause is contrary to the manifest weight of the evidence presented at the administrative hearing and is contrary to law.

9. The Board of Review's decision is contrary to Article I, §3 of the Constitution of the State of Illinois and the First Amendment of the United States Constitution in that it denies Plaintiff his right to free exercise of his religious principles.

10. Defendants are hereby requested to file an answer, consisting of the original or a certified copy of the entire record of proceedings under review, including the transcript of evidence presented and all documents submitted to the defendant administrative agency.

WHEREFORE, the Plaintiff prays that this Court review the Defendants' record of proceedings in this cause, reverse the decision of the defendant administrative agency and find the Plaintiff to be eligible to receive unemployment insurance benefits for the period in question.

/s/ William A. Frazee
WILLIAM A. FRAZEE, Plaintiff

SUSAN DAWSON-TIBBITS
Attorney for Plaintiff
PRAIRIE STATE LEGAL SERVICES, INC.
414 Hamilton Blvd., Suite 301
Peoria, IL 61602
Telephone: (309) 674-9831

(EXHIBIT A - a copy of the Decision from the State of Illinois Department of Employment Security Board of Review, reproduced in this Joint Appendix at pp. 17-19.)

IN THE CIRCUIT COURT OF
THE TENTH JUDICIAL CIRCUIT OF ILLINOIS
PEORIA COUNTY

CASE NO. 85-MR-69

WILLIAM A. FRAZEE,
Plaintiff,

vs.

ILLINOIS DEPARTMENT OF
EMPLOYMENT SECURITY, et al.,
Defendant

ORDER

Now comes for hearing the complaint of Plaintiff to review the administrative decision entered by the Illinois Department of Employment Security; Plaintiff is present through his attorney, Daniel J. Smith, Defendant is present through its attorney, Dianna Dentino-Zimmerman, Special Assistant Attorney General.

The Court having now fully considered the record filed herein by the Illinois Department of Employment Security together with the arguments of counsel based thereon, finds that the decision of the Illinois Department of Employment Security denying benefits to the Plaintiff was not contrary to law nor against the manifest weight of the evidence and should thereby be affirmed.

It is hereby Ordered that the decision of the Board of Review of the Illinois Department of Employment Security be, and the same is affirmed.

Order entered 11-18-86.

/s/ Robert E. Manning
JUDGE OF THE TENTH
JUDICIAL CIRCUIT

APPEAL TO THE APPELLATE COURT OF ILLINOIS,
THIRD DISTRICT FROM THE CIRCUIT COURT OF
THE TENTH JUDICIAL CIRCUIT
PEORIA COUNTY, ILLINOIS

CASE NO. 85 MR 69

WILLIAM A. FRAZEE,
Plaintiff-Appellant,

vs.

ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD, Director of the Illinois Department of Employment Security; BRUCE W. BARNES, Chairman, Board of Review; and KELLY SERVICES,
Defendant-Appellees

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the Plaintiff, WILLIAM A. FRAZEE, by and through his attorney, DANIEL J. SMITH of PRAIRIE STATE LEGAL SERVICES, INC., hereby appeals to the Appellate Court of Illinois, Third District, from the Order of the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois, entered in this cause on November 18, 1986.

The Order of November 18, 1986 is appealed in its entirety.

The Plaintiff respectfully prays that said Order be reversed.

Dated this 18th day of December, 1986.

/s/ Daniel J. Smith
DANIEL J. SMITH
Attorney for Plaintiff-Appellant
PRAIRIE STATE LEGAL SERVICES, INC.
414 Hamilton Blvd., Suite 301
Peoria, Illinois 61602
Telephone: (309) 674-9831

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT
OTTAWA

3-86-0842
Frazee v. IL Dept. of Empl. Security

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the year of our Lord one thousand nine hundred and eighty-seven, within and for the Third District of Illinois:

Present -

HONORABLE TOBIAS BARRY, Presiding Justice	X
HONORABLE ALLAN L. STOUDER, Justice	
HONORABLE WILLIAM B. WOMBACHER, Justice	X
HONORABLE JAMES D. HEIPLE, Justice	
HONORABLE ALBERT SCOTT, Justice	X
JOSEPH FENNESSEY, Clerk	

BE IT REMEMBERED, that afterwards on August 13, 1987 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following viz:

No. 3-86-0842

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 1987

WILLIAM A. FRAZEE,

Plaintiff-Appellant,

vs.

ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD, Director of the Illinois Department of Employment Security; BRUCE W. BARNES, Chairman, Board of Review,

Defendants-Appellees,

and

KELLY SERVICES,

Defendant.

Appeal from the Circuit Court of Peoria County

Honorable Robert E. Manning, Judge, Presiding

JUSTICE SCOTT delivered the opinion of the court:

This is an appeal from an order of the circuit court of Peoria County which affirmed a decision of the defendant Illinois Department of Employment Security which determined that the plaintiff, William A. Frazee, should be disqualified from receiving unemployment benefits due to his refusal to work.

The decision of the Board of Review of the Department of Employment Security capsulizes the facts which led to this appeal. The pertinent part of that decision is as follows:

"In this case, the evidence established that the claimant refused an offer of suitable work without good cause, as his personal desire, no matter how strong or sincere (sic) held, did not constitute good cause for his refusal of work. When a refusal of work is based on religious convictions, the refusal must be based upon some tenets or dogma accepted by the individual of some church, sect, or denomination, and such a refusal based solely on an individual's personal belief is personal and non-compelling and does not render the work unsuitable. It is not the purpose of the Act nor of the Board of Review to abridge or to deny the claimant's constitutional right to the free exercise of religion by imposing a disqualification from benefits. However, other than his own self-serving testimony, the claimant has presented no corroborative evidence to establish that working on a Sunday was unsuitable for him. The claimant's contention that, subsequent to his refusal, he learned that his schedule could have been adjusted, is pure hearsay and conjecture and is of no evidentiary weight."

We have presented for determination in this appeal the question of whether the plaintiff's personal professed religious belief that he could not work on Sundays constituted good cause for his refusal of work.

In support of his contention that his refusal to work on Sunday because of his personal religious belief constituted good cause the plaintiff cites a number of cases. We direct our attention to three United States Supreme Court cases, namely, *Thomas v. Review Board* (1981), 450 U.S. 707, 67 L.Ed.2d 624, 101 S. Ct. 1425; *Sherbert v. Verner* (1963), 374 U.S. 398, 10 L.Ed.2d 965, 83 S.Ct. 1790; and *Hobbie v. Unemployment Compensation Appeals Commission of Florida* (1987), _____ U.S. _____, _____ L.Ed.2d _____, _____ S. Ct. _____, 55 L.W. 4208.

An examination of the cases discloses that in *Thomas* the claimant was a Jehovah's Witness who quit his employment when he was assigned to a department which produced turrets for military tanks. The supreme court of Indiana found the claimant

to be ineligible for unemployment compensation. This determination was overturned by the United States Supreme Court on the grounds that the claimant's religious beliefs were entitled to First Amendment protection. In *Thomas* the court made the following observation:

> "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or *where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.*"
>
> 450 U. S. at 717-718. (Emphasis added)

The *Sherbert* case involved a Seventh Day Adventist who was discharged by her employer for her refusal to work on Saturday, the sabbath day of her faith. Her application for unemployment compensation benefits from the State of South Carolina was denied. The United States Supreme Court reversed the supreme court of South Carolina on the grounds that denial of unemployment compensation benefits to a Seventh Day Adventist restricted the free exercise by the claimant of her religious beliefs. The United States Supreme Court in reaching such a decision stated:

> "Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forgo that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Sherbert v. Verner* (1963), 374 U.S. 398, _____, 10 L.Ed.2d 965, 970-971, 83 S. Ct. 1790, _____.

An examination of the United States Supreme Court opinion in *Hobbie* discloses that the claimant Hobbie, after 2 1/2 years of

employment at the jewelry store, informed her immediate supervisor that she was to be baptized into the Seventh Day Adventist Church and that for religious reasons she would no longer be able to work on her sabbath, from sundown on Friday to sundown on Saturday. The claimant was ultimately discharged and denied unemployment compensation benefits by the State of Florida. The United States Supreme Court reversed the denial and in so doing relied upon its prior decision in the cases of *Thomas* and *Sherbert*.

Our examination of the foregoing cases reveals that a common thread was running through each case, namely, that in each case the claimant was a member of an established religious sect or church; that each of the claimants in refusing to work at a particular place or time was exercising what was believed to be a tenet, belief or teaching of an established religious body.

In the instant case the plaintiff does not claim that his refusal to work on Sunday is based upon any tenet of a church or religious body. He takes the position that he is a Christian and as such he feels it wrong to work on Sunday.

The dividing line between the plaintiff in the instant case and the claimants in the cases of *Thomas*, *Sherbert* and *Hobbie* may be a thin and fragile line, however, it is a dividing line which we deem significant.

We do not question the sincerity of the plaintiff. Historically the Christians gave Sunday to the world as a holy day in the 4th century (A.D. 321 - decree of Roman Emperor Constantine). However, Sunday and the sabbath are not synonomous. For Christians Sunday is the first day of the week. Sabbath day for the Jewish people is Saturday, the last day of the week, and for the Moslems the sabbath is Friday. The idea that a day was to be set aside for worship, rest and relaxation from the daily rigors appears early in the history of man. "On the sixth day God completed all the work he had been doing, and on the seventh day he ceased from all his work. God blessed the seventh day and made it holy, because on that day he ceased from all the work he had set himself to do." Holy Bible, Genesis 2.

In 1490 B.C. (circa) the people of Israel found a man gathering sticks in the wilderness on the Sabbath day. Those who found him brought him before Moses and Aaron and to all the congregation. He was ordered to be stoned to death and he was. Holy Bible, Numbers 15.

Moses in receiving the ten commandments related them to the Israelites in Transjordan in the wilderness, the fourth commandment being, "Keep the sabbath day holy as the Lord your God commanded you." Holy Bible, Deuteronomy 5.

The biblical mandates regarding the sabbath day were referring to Saturday, the last day of the week, however, such practice and precedent was followed by the Christians who adopted Sunday as their sabbath day.

From the beginning of the colonization of America the Colonies and the States enacted laws regarding what could and what could not be done on Sunday. The process was slow but the day evolved from one not only devoted to religion but also to one of rest. Each of our thirteen American Colonies had laws which regulated what should be done on Sunday. The first "blue laws" were probably enacted by the New Haven Colony in 1656. Nearly all the blue laws prohibited all work on Sunday except works of necessity and charity. American pioneers had little choice but to ignore the so-called "blue laws" which prohibited work on Sunday. It was necessary to work continuously in order to survive. As the pioneers crossed the mountains into the Western lands, the blue laws were ignored.

There are still "blue laws" on the books of many of our States prohibiting certain business, recreation, and other activity, however, our way of life has resulted in the same being ignored and unenforced.

What would Sunday be today if professional football, baseball, basketball and tennis were barred. Today Sunday is not only a day for religion, but for recreation and labor, Today the supermarkets are open, service stations dispense fuel, utilities continue to serve the people and factories continue to belch smoke and tangible products. Our own State has only one current Sun-

day closing law, being the law which bans automobile sales on Sunday, a regulation which for financial reasons has been supported by the majority of the automobile dealers. Efforts to repeal the law have been unsuccessful.

We delve into the history of the significance of Sunday as to the activities permitted in order to illustrate that from a day designated as a holy day it has evolved into a day of also permitting rest, recreation, business, industry and labor. Such a change is not surprising, but on the contrary is dictated by the American way of life. If all Americans were to abstain from working on Sunday, chaos would result.

The assertion by one that as a Christian he or she does not have to accept employment which entails Sunday working and that such refusal will not affect the right to receive unemployment compensation benefits is not supported by the law of our State. As heretofore stated, the injunction against Sunday labor must be found in a tenet or dogma of an established religious sect. The plaintiff in this case does not profess to be a member of any such sect.

For the reasons set forth the judgment of the circuit court of Peoria County is affirmed.

Affirmed.

STATE OF ILLINOIS,)
APPELLATE COURT,) ss.
THIRD DISTRICT,)

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of August in the year of our Lord one thousand nine hundred and eighty seven.

/s/ Joseph Fennessey
Clerk of the Appellate Court

No. 3-86-0842

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

WILLIAM A. FRAZEE,
Plaintiff-Appellant,

vs.

ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD, Directory of the Illinois Department of Employment Security; BRUCE W. BARNES, Chairman, Board of Review,
Defendants-Appellees,

and KELLY SERVICES,
Defendant.

Appeal from the Circuit Court of Peoria, County, Illinois

Honorable Robert E. Manning, Judge, Presiding

No. 85 MR 69

APPELLANT'S PETITION FOR REHEARING

DANIEL J. SMITH
Attorney at Law
PRAIRIE STATE LEGAL SERVICES, INC.
414 Hamilton Blvd., Suite 301
Peoria, Illinois 61602
Telephone: (309) 674-9831
Attorney for Appellant

PETITION FOR REHEARING

Plaintiff-Appellant William Frazee, pursuant to Supreme Court Rule 367, respectfully petitions this Court for a rehearing of its decision in this case for two reasons. First, the Court misapprehends the First Amendment freedom to exercise one's religion by limiting this freedom only to practices which are "found in a tenet or dogma of an established religious sect." Opinion at 8. Second, the decision overlooks the independent statutory grounds presented for reversal in the briefs.

I. FIRST AMENDMENT FREEDOM

The Court's decision is inconsistent with the United States Supreme Court's decision in *Thomas v. Review Board*, 450 U.S. 707 (1981). See Brief for Appellant at 7-11; Reply Brief for Appellant at 1-2. In *Thomas*, the unemployment compensation claimant testified only that his own "strict reading of [Jehovah's] Witnesses principles" led him to conclude that he could not work on armaments. 450 U.S. at 710. This interpretation was not shown to be a church tenet or dogma. In fact, a coworker who was also a Jehovah's Witness informed the claimant that his belief was *not* mandated by their church. 450 U.S. at 710. Similarly, Mr. Frazee's interpretation of the principles of Christianity led him to conclude that his Christian religion precluded him from working on Sundays.

This Court's decision recognizes the sincerity of Mr. Frazee's conviction. Opinion at 5. Likewise, this Court's decision recognizes that this conviction is well-founded based on the history and traditions of the Christian religion. Opinion at 5-6. To be entitled to First Amendment protection requires nothing more. "So long as one's faith is religiously based at the time it is asserted, it should not matter, for constitutional purposes, whether that faith derived from revelation, study, upbringing, gradual evolution, or some source that appears entirely incomprehensible." *Hobbie v. Unemployment Appeal Commission*, 480 U.S. ____, 94 L.Ed.2d 190, 199 n.9, 107 S.Ct. 1046 (1987), *quoting Callahan v. Woods*, 658 F.2d 679, 687 (9th Cir. 1981).

> A religious claim, to merit protection under the free exercise clause of the First Amendment, must satisfy two basic criteria. First, the claimant's proffered belief must be sincerely held; the First Amendment does not extend to "so-called religions which ... are obviously shams and absurdities and whose members are patently devoid of religious sincerity."... . Second... the claim must be rooted in religious belief, not in "merely secular" philosophical concerns. *Cf. United States v. Seeger*, 380 U.S. 163, 185, 85 S.Ct. 850, 863, 13 L.Ed.2d 733 (1965) (test for religious belief within meaning of draft law exemptions is whether beliefs professed are sincerely held and, in claimant's scheme of things, religious).

Callahan v. Woods, 658 F.2d 679, 683 (9th Cir. 1981) (other citations omitted). As already recognized by this Court's decision, Mr. Frazee's conviction against his working on Sunday meets these requirements.

It is not necessary, in addition, that his conviction against working on Sunday derive from a dogma or tenet of any particular church. The Court's decision overlooks the numerous cases already cited which do not require that a belief be founded in a church dogma or tenet to be entitled to First Amendment protection. See Brief for Appellant at 9-12. "To be protected, a particular form of religious expression need not be mandated by one's religion or even endorsed by a majority of its adherents as long as it is an expression of a sincere, religiously based conviction." *Azeez v. Fairman*, 604 F. Supp. 357, 362 (D.Ill. 1985), *quoting Masjid Muhammad-D.C.C. v. Keve*, 479 F. Supp. 1311, 1323 (D. Del. 1979).

The recognitions of Mr. Frazee's conviction as a protected First Amendment expression would not cause all Americans to abstain from working on Sunday. Opinion at 7. As set forth in the Reply Brief at 1-2, the United States Supreme Court rejected a similar argument in *Sherbert v. Verner* 374 U.S. 398 (1963) and *Thomas*. "There is no evidence in the record to indicate that the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large enough to

create 'widespread unemployment,' or even to seriously affect unemployment--and no such cliam was advanced by the Review Board." 450 U.S. at 718-719. As this Court's opinion well recognizes, in our country many other people choose to work on Sunday. Mr. Frazee's religious convictions do not preclude them from this practice. The First Amendment, however, prevents the state from requiring Mr. Frazee to conform his religious beliefs and convictions to the customs and practices of others in our society.

II. STATUTORY RIGHTS

Second, the Court's decision overlooks the statutory arguments presented to this Court and to the Circuit Court. Brief for Appellant at 12-16; Reply Brief for Appellant at 2-4; Complaint for Administrative Review, C. 2-3; Plaintiff's Memorandum in Support of Complaint for Administrative Review, C. 68-72. The statutory arguments provide an independent basis for reversing the Circuit Court's decision. This Court's decision does not address the arguments presented that Mr. Frazee refused work for good cause and that he refused work unsuitable for him. Brief for Appellant at 12-16; Reply Brief for Appellant at 2-4.

These statutory arguments are not identical to the constitutional arguments. Rather, good cause to refuse work requires only good faith and a general desire to be employed. These conditions were evident from Mr. Frazee's conduct. See Brief for Appellant at 14-15. Likewise, the determination of a job's suitability for an individual requires consideration of his own morals, not just church dogma or tenets. Reply Brief at 3-4. Further a job's suitability requires consideration of the employee's prior training and prospects for securing work in his customary field. Brief for Appellant at 16. A rehearing on this case is necessary to address these arguments already presented to this Court and overlooked by the Court's decision.

CONCLUDED

For the foregoing reasons, this Court should rehear this case and reverse the Circuit Court's decision.

Respectfully submitted,

/s/ Daniel J. Smith
DANIEL J. SMITH
Attorney at Law
PRAIRIE STATE LEGAL SERVICES
414 Hamilton Blvd., Suite 301
Peoria, Illinois 61602
Telephone: (309) 674-9831

Attorney for Plaintiff-Appellant
WILLIAM A. FRAZEE

THE APPELLATE COURT
THIRD DISTRICT STATE OF ILLINOIS

Joseph Fennessey
Clerk of Court

Ottawa, Illinois 61350
815 434-5050

Be it Remembered, That, to wit: On the 22nd day of September, 1987, certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz:

3-86-0842

William A. Frazee,
Plaintiff-Appellant,

vs.

Illinois Department of Employment Security,
Sally Ward, Director of the Illinois Department of
Employment Security; and Bruce W. Barnes,
Chairman, Board of Review,
Defendants-Appellees,
and Kelly Services,
Defendant.

APPEAL FROM: Peoria County
Hon. Robert E. Manning
85 MR 69

Now on this day this cause coming on for hearing upon the petition for rehearing filed by Daniel J. Smith, herein, and the Court having duly considered said petition, as well as the matters and things alleged in support thereof, and being now fully advised in the premises;

It is therefore ordered by the Court that said petition for rehearing be and the same is hereby overruled and denied.

/s/ Joseph Fennessey
Clerk of the Appellate Court

No. 66057

IN THE
SUPREME COURT OF ILLINOIS

WILLIAM A. FRAZEE,
Plaintiff-Petitioner,

vs.

ILLINOIS DEPARTMENT OF EMPLOYMENT
SECURITY, an Administrative Agency of the State of Illinois;
SALLY WARD, Directory of the Illinois
Department of Employment Security;
BRUCE W. BARNES, Chairman, Board of Review,
Defendants-Respondents,

and KELLY SERVICES,
Defendant.

Petition for Leave to Appeal from the
Appellate Court of Illinois, Third District, No. 3-86-0842

There Heard on Appeal from the Circuit Court of
Peoria County, Illinois, No. 85 MR 69,
Honorable Robert E. Manning, Judge Presiding

PETITION FOR LEAVE TO APPEAL

DANIEL J. SMITH
Attorney at Law
PRAIRIE STATE LEGAL SERVICES, INC.
414 Hamilton Blvd., Suite 301
Peoria, Illinois 61602
Telephone: (309) 674-9831
Attorney for Plaintiff-Petitioner

IN THE
SUPREME COURT OF ILLINOIS

WILLIAM A. FRAZEE,
Plaintiff-Petitioner,

vs.

ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD, Directory of the Illinois Department of Employment Security; BRUCE W. BARNES, Chairman, Board of Review,
Defendants-Respondents,

and KELLY SERVICES,
Defendant.

Petition for Leave to Appeal from the
Appellate Court of Illinois, Third District, No. 3-86-0842

There Heard on Appeal from the Circuit Court of
Peoria County, Illinois, No. 85 MR 69,
Honorable Robert E. Manning, Judge Presiding

PETITION FOR LEAVE TO APPEAL

PRAYER FOR LEAVE TO APPEAL

The Plaintiff-Petitioner, WILLIAM A. FRAZEE, respectfully petitions this Court pursuant to Supreme Court Rule 315 for leave to appeal from the judgment of the Appellate Court of Illinois, Third Circuit.

JUDGMENT BELOW

The appellate court entered its judgment in this case on August 13, 1987. A petition for rehearing was filed on September 1, 1987. Rehearing was denied on September 22, 1987. A copy of the opinion and rehearing decision are in the appendix following this petition.

POINTS RELIED UPON FOR REVERSAL

1. The Appellate Court found that a Christian whose convictions preclude working on Sunday can be denied unemployment insurance benefits for refusing to work on a Sunday where he does not purport to belong to a denomination or sect having dogma or tenets precluding Sunday employment. The appellate court did so despite finding that the person's conviction is sincere and while acknowledging that this conviction is well-founded in the history and tradition of the worldwide Christian religion.

2. Requiring a religious conviction to derive from an accepted dogma or tenet of an established religious body is not the proper basis for determining whether it is entitled to First Amendment protection. To be protected by the First Amendment of the United States Constitution, a conviction need only be sincerely held and rooted in religion, instead of "merely secular" philosophical concerns. *Callahan v. Woods*, 658 F.2d 679, 687 (9th Cir. 1981). *See Hobbie v. Unemployment Appeal Commission*, 480 U.S. ____, 94 L.Ed.2d 190, 107 S.Ct. 1046, 1049 (1987); *Thomas v. Review Board*, 450 U.S. 707, 717-18 (1981); *Cf. United States v. Seeger*, 380 U.S. 163, 165 (1965) (construing test for religious belief within meaning of draft law).

3. The United States Supreme Court and courts from other jurisdictions have found that persons holding religious convictions not based on tenets or dogma of a particular religious body are entitled to a First Amendment protection. *Thomas v. Review Board*, 450 U.S. 707 (1981); *See, e.g., Dotter v. Maine Employment Security Commission*, Me., 435 A.2d 1368 (1981); *Murphy v. Everett*, 5 Ark.App. 281, 635 S.W.2d 301 (1982).

4. The Appellate Court's decision fails to consider that an employee is entitled to refuse work for good cause pursuant to the Illinois Unemployment Insurance Act, Ill.Rev.Stat. ch. 48, 433. Good cause for refusing work may be found in the claimant's personal circumstances and should be judged by his reasonableness in light of the circumstances. *Eddings v. Department of Labor*, 146 Ill.App.3d 62, 496 N.E. 2d 1167, 1170, 100 Ill.Dec. 102, 105 (1st Dist. 1986). Petitioner showed good cause because his personal circumstances prohibited working on Sunday and he reasonably inquired about an alternative work schedule for the only Sunday involved in the five day job offer.

5. The Appellate Court's decision fails to consider than an employee is entitled to refuse work which is not suitable for him. Ill.Rev.Stat. ch. 48, 433. This statute specifically requires that the degree of risk to a person's morals must be considered to determine the suitability of the work. Morals are general principals of right conduct, not circumscribed to accepted church tenets or dogma.

STATEMENT OF FACTS

While unemployed, William A. Frazee was denied continuing unemployed insurance benefits for refusing to work on a Sunday due to his beliefs and practices as a Christian. William Frazee received unemployment compensation benefits as an unemployed clerical worker until May 5, 1984. C.39. He was seeking work through Defendant, Kelly Services, who assigned him to various jobs that they had in April, 1984. C.33. After performing several job assignments, Mr. Frazee talked to Kelly Services representatives on April 30, 1984 about a job which the representatives said they had with the Designer Warehouse Outlet, an out-of-state company for whom Kelly Services was recruiting people to work. C.34,40. Mr. Frazee asked the Kelly Services represenatives what the days and hours would be. C.34. They told him that it would be Wednesday through Sunday, May 9th through 13th. C.34-35.

Mr. Frazee is a Christian. C.35. Although he does not attend a church which prohibits Sunday employment, according to

his religious belief as a Christian, he cannot work on Sundays. C.35-36. Because of this religious conviction, he asked the Kelly Sevices representatives if it was possible to work Wednesday through Saturday only. C.35. They told him that he could not and that he had to be available for all five days or else he could not be considered for hire. C.35. Mr. Frazee told them, "Well, if I had to be available Sunday, I can't. As a Christian I can't do that." C.35.

Mr. Frazee was the only person who presented evidence at the administrative hearing. C.32-43. On June 20, 1984 the hearings referee issued a decision finding Mr. Frazee ineligible for Unemployment Compensation benefits. C.49. Mr. Frazee filed a timely notice of appeal of this decision. C.51-53. On March 22, 1985 the Board of Review of the Department of Employment Security affirmed the referee's decision. C.55-56. The Circuit Court and Court of Appeals both affirmed this decision. C.3 and Appendix *infra*. At no stage has the sincerity of Mr. Frazee's conviction against his working on Sundays been challenged. Indeed, the Appellate Court noted, "We do not question the sincerity of the plaintiff." Decision at 5.

ARGUMENT

A. THE APPELLATE COURT'S DECISION NARROWLY TIES PROTECTED RELIGIOUS BELIEFS TO ACCEPTED TENETS AND DOGMA OF AN ESTABLISHED RELIGIOUS SECT, CONTRARY TO ESTABLISHED FIRST AMENDMENT JURISPRUDENCE WHICH REQUIRES ONLY THAT SUCH BELIEFS BE SINCERELY HELD AND ROOTED IN RELIGION.

This case involves an important constitutional question of first impression in this state. The narrow range of religious freedoms which the Appellate Court decision would protect makes religious liberty guaranteed in Illinois far more restricted than the guarantees required by the United States Supreme Court and recognized by other jurisdictions. Broad implications may fol-

low from this decision because it would require people to tailor their religious practices to the customs of the majority unless they show that a particular church dogma or tenet specifically requires otherwise. Such conformity is inconsistent with the religious freedom which the First Amendment guarantees to individuals, not simply to church members following church orthodoxy. This Court should review the Appellate Court decision pursuant to Supreme Court Rule 315 because of the importance of this question.

The appellate decision too narrowly construes the freedom of religion guaranteed by the First Amendment of the United State Constitution. The appellate decision acknowleges that Mr. Frazee is sincere in his conviction against working on Sunday. Decision, p.5. Likewise, the decision recognizes that Mr. Frazee's conviction is well-founded based on the history and traditions of Christianity. Decision at 5-6. To be entitled to First Amendment protection requires nothing more. "So long as one's faith is religiously based at the time it is asserted, it should not matter, for consitutional purposes, whether that faith derived from revelation, study, upbringing, gradual evolution, or some source that appears entirely incomprehensible." *Hobbie v. Unemployment Appeal Commission*, 480 U.S. ____, 94 L.Ed.2d 190, 199 n.9, 107 S.Ct. 1046 (1987), *quoting Callahan v. Woods*, 658 F.2d 679, 687 (9th Cir. 1981).

> A religious claim, to merit protection under the free exercise clause of the First Amendment, must satisfy two basic criteria. First, the claimant's proffered belief must be sincerely held; the First Amendment does not extend to "so-called religions which ... are obviously shams and absurdities and whose members are patently devoid of religious sincerity." . . . . Second . . . the claim must be rooted in religious belief, not in "merely secular" philosophical concerns. *Cf. United States v. Seeger*, 380 U.S. 163, 185, 85 S.Ct. 850, 863, 13 L.Ed.2d 733 (1965) (test for religious belief within meaning of draft law exemptions is whether beliefs professed are sincerely held and, in claimant's scheme of things, religious).

Callahan v. Woods, 658 F.2d 679, 683 (9th Cir. 1981) (other citations omitted). Thus, contrary to the appellate decision of the Third District, the protection of First Amendment religious freedom extends to all sincerely held beliefs which are rooted in religion.

It is not necessary, in addition, that a conviction derive from a dogma or tenet of any particular church. "To be protected, a particular form of religious expression need not be mandated by one's religion or even endorsed by a majority of its adherents as long as it is an expression of a sincere, religiously based conviction." *Azeez v. Fairman*, 604 F.Supp. 357, 362 (C.D.Ill. 1985), *quoting Masjid Muhammad-D.C.C. v. Keve*, 479 F.Supp. 1311, 1323 (D.Del. 1979).

On three separate occasions, most recently in 1987, the United States Supreme Court has found that denial of unemployment insurance benefits to persons who refuse work for religious reasons violate the First Amendment of the United States Constitution. In two of these cases, the Supreme Court explicitly found such a violation where the particular religious conviction was a personal one not necessarily shared by any particular church or sect.

In *Thomas v. Review Board*, 450 U.S. 707 (1981), the Supreme Court reversed a decision of the Indiana Supreme Court and held that unemployment compensation benefits must be granted to a person who left his employment for religious reasons. In that case the claimant was a Jehovah's Witness who had been transferred at work to a department which produced turrets for military tanks. 450 U.S. at 710. He checked the company bulletin board and discovered that no other positions were available which did not involve the manufacture of weaponry. 450 U.S. at 710. Although he consulted with another Jehovah's Witness at the plant who advised him that working on weapons was not prohibited by their religion, the claimant said that he could not "rest with" this view and he quit his employment because of his religious misgivings concerning working on armaments. 450 U.S. at 710. Thus, contrary to the Appellate Court's decision, the United States Supreme Court in *Thomas* recognized that that case did not in-

volve a church tenet or dogma, or even an interpretation of a church tenet or dogma.

The Indiana Supreme Court had found the claimant ineligible for unemployment compensation in part because it labeled his reasons for quitting as personal reasons rather than religious beliefs. 450 U.S. at 713. The United States Supreme Court overruled this determination. The Court held that the resolution of the question of what is a "religious" belief or practice "is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendmetn protection." 450 U.S. at 714. Likewise, the Supreme Court ruled that the claimant's beliefs were still religious beliefs entitled to First Amendment protection even though they were not shared by other followers of the same religion.

> One can, of course, imagine an asserted claim so bizarre, so clearly non-religious in motivation, as to be not entitled to protection under the Free Exercise Clause; but that is not the case here and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.

450 U.S. at 715-716.

That the Supreme Court considered religious beliefs entitled to constitutional protection even where they are not the tenets or dogma of a church is clear from the decision.

> Where the state conditions receipt of an important benefit upon conduct prescribed by a religious faith, *or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify this behavior and to violate his beliefs*, a burden upon religion exists.

450 U.S. at 717-718 (emphasis added). Thus, not only is conduct prescribed by a religious faith protected, but conduct also mandated by religious belief, without regard to any mention of church tenets, is also protected by the First Amendment.

More recently, the United States Supreme Court held in *Hobbie v. Unemployment Compensation Appeals Commission of Florida*, 480 U.S. ____, 94 L.Ed.2d 190, 107 S.Ct. 1046 (1987) that a recent convert to the Seventh Day Adventist church could not be denied unemployment compenstion benefits when she was fired because she refused to work on the Sabbath (after sundown every Friday until sundown Saturday). *See also, Sherbert v. Verner*, 374 U.S. 398 (1963). The Court's decision did not depend on any particular tenet or dogma of the Claimant's church; rather, the Court stated that "for religious reasons, she would no longer be able to work on her Sabbath." 107 S.Ct. at 1047. The Court repeated the *Thomas* rationale, emphasizing that religious beliefs, in addition to proscriptions by a religious faith, are entitled to First Amendment protection. 107 S.Ct. at 1049.

Thus, the United States Supreme Court has, in the last six years, twice explicitly stated that a person cannot be denied unemployment insurance benefits for personal religious beliefs, regardless of whether any church tenet or dogma is involved. The Appellate Court's decision that a refusal of work based on a religious conviction must be based upon the tenets or dogma of some church, sect, or denomination is in error.

In other contexts, courts have readily acknowledged convictions far more uncommon than a refusal to work on Sunday as religious. *See, e.g., Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981) (refusal to obtain a social security number, allegedly the "mark of the beast" mentioned in the Book of Revelations); and *Kaplan v. Hess*, 694 F.2d 847 (D.C. Cir. 1982) (refusal to stand when a judge enters a courtroom because such practices allegedly constitute giving homage to a human diety). Neither case involved any church dogma or tenet. They did involve, however, sincerely held religious beliefs and were thus entitled to First Amendment protection.

This case does not involve a claim "so bizarre, so clearly nonreligious in motivation" so as to be beyond constitutional protection. Rather, Mr. Frazee's conviction is so common among religious persons, and especially among Christians, that no question should exist concerning its First Amendment protection.

Comparing asserted religious beliefs to recognized religious doctrines has been said to be "the standard by which [the asserted] beliefs are measured for inclusion into the First Amendment guarantee." *Callahan*, 658 F.2d at 685. Mr. Frazee's conviction as a Christian not to work on Sunday is the same type of conviction as the Seventh Day Adventists' refusal to work on their Sabbath in *Sherbert* and *Hobbie*. Likewise, it is commonly known and recognized that "Sunday is the first day of the week among Christian peoples. It is the day set aside for rest and worship of God." 18 World Book Encyclopedia 788, *Sunday* (1974). In fact, the Supreme Court of Illinois has ruled that laws and ordinances "to protect persons keeping the Christian Sabbath as a day of holiness, from disturbance in its observance" are permissible so long as they do not prohibit otherwise lawful activities which do not reasonably tend to disturb others. *Pacesetter Homes, Inc. v. Village of South Holland*, 18 Ill.2d 247, 163 N.E.2d 464, 468 (1960). Consequently, it is abundantly clear from the record that Mr. Frazee's conviction "as a Christian" not to work on Sunday is a religious belief entitled to First Amendment protection.

Furthermore, numerous cases from other jurisdictions have ruled that persons asserting religious convictions similar to Mr. Frazee's convictions cannot be denied unemployment compensation benefits due to a refusal of work which would be contrary to their convictions. *See, e.g., Lincoln v. True*, 408 F.Supp. 22 (D.Ky. 1975); *Dotter v. Maine Employment Security commission*, Me., 435 A.2d 1368 (1981). *Murphy v. Everett*, 5 Ark.App. 281, 635 S.W.2d 301 (1982); *Detroit Gravure Corporation v. Michigan Employment Security Commission*, 366 Mich. 530, 115 N.W.2d 368 (1962); *Swenson v. Michigan Employment Security Commission*, 340 Mich. 430, 65 N.W.2d 709 (1954); *St. Germain v. Adams*, 117 N.H. 659, 377 A.2d 620 (1977); *In re Miller*, 243 N.C. 509, 91 S.E.2d 241 (1956); *Southeastern Pennsylvania Transportation Authority v. Commonwealth Unemployment Compensation Board of Review*, 54 Pa. Cmwlth. 165, 420 A.2d 47 (1980).

The *Dotter* and *Murphy* cases are illustrative. In the *Dotter* case, the Supreme Court of Maine determined that a school teacher was entitled to unemployment compensation following his

termination from his employment after the school refused to allow him time off to attend a church festival although the teacher's faith did not mandate attendance. Citing the *Thomas* decision, the Supreme Court of Maine stated, "Although Dotter's desire to attend the festival was personal, it was also based on a sincere religious belief. Consequently Dotter's participation in the festival was a constitutionally protected form of religious expression, notwithstanding the fact that his attendance was not mandatory." 435 A.2d at 1373. Similarly, in *Murphy*, the claimant was fired from her employment after her employer obtained a license to sell liquor. The court stated that because her religious principes precluded her from working in the store, she was entitled to unemployment compensation benefits. 635 S.W.2d at 302. Again, this decision did not depend on whether her personal convictions were supported by any church tenets or dogma.

In this case where Mr. Frazee asserted that as a Christian, he could not work on Sunday, there is not doubt that his conviction is based on his religious beliefs. Thus, his conviction is not so bizarre, or clearly non-religious in motivation as to be unprotected by the First Amendment. No evidence in the record shows that this conviction is anything but a sincerely held religious belief commonly shared among Christian people. Consequently to deprive Mr. Frazee of unemployment insurance benefits due to this religious conviction contravenes his First Amendment rights.

Finally, it is important to recognize that the narrow construction of protected religious freedom established by the Appellate Court's decision can easily be applied in other contexts as well, to the severe detriment of religious liberty. The appellate decision would permit the government to require individuals to conform their religious practices to the customs of the general population unless they can show that a specific church tenet or dogma specifically requires them to do otherwise. A rule that religious beliefs and practices are entitled to constitutional protection only when they are based on accepted dogma or tenets of a specific sect or denomiantion is not only contrary to established jurisprudence, but such a rule, generally applied, would emasculate First Amendment religious freedom. Such constrainsts deny the broad in-

dividual freedom of religion which the founders of our country sought to guarantee, especially to persons whose religious beliefs are contrary to the religious beliefs of the majority.

B. THE APPELLATE COURT'S DECISION DISREGARDS PETITIONER'S ASSERTIONS OF A STATUTORY RIGHT TO REFUSE WORK WHICH CONTRAVENES ONE'S RELIGIOUS BELIEFS.

This case involves an important statutory questions of first impression in Illinois also. The Appellate Court's failure to address the statutory issues presented may lead other courts to conclude that the rights guaranteed to unemployed workers under the Illinois Employment Insurance Act have no application where religious beliefs and practices are involved. This Court should review the Appellate Court decision pursuant to Supreme Court Rule 315 because of the importance of the statutory issues presented.

The appellate decision entirely ignored Mr. Frazee's statutory arguments. Even without reference to the constitutional principles involved, the language of the Illinois Unemployment Insurance Act sufficiently demonstrates that Mr. Frazee's unemployment insurance benefits should not have been terminated. Ill.Rev.Stat. Ch. 48 433 provides, in pertinent part:

> An individual shall be ineligible for benefits if he has failed, without good cause, either to apply for available or suitable work when so directed by the employment office or Director, or to accept suitable work offered to him by the employment office or an employing unit ...

Thus, a person is not disqualified for refusing work with good cause or for refusing unsuitable work.

Mr. Frazee's refusal of the work offered for religious reasons constitutes good cause. Although no Illinois courts of review have addressed this question, other state courts have ruled that claimants for unemployment compensation benefits have good cause to refuse employment which involves work contrary to their

religious beliefs. *See e.g., Nottelson v. Wisconsin Department of Industry, Labor, & Human Relations*, 94 Wis.2d 106, 287 N.W.2d 763 (1980); *Wallace v. Bureau of Unemployment Compensation*, 81 Ohio L.Abs. 195, 160 N.E.2d 580 (Ct.Com. Pl 1959).

These rulings are consistent with Illinois decisions concerning the good cause requirement.

> In Illinois the term "good cause" is not confined to reasons connected with the employer but may be found in the claimant's personal circumstances or his unsuitability for the particular job and should be judged by the reasonableness of the claimant's actions in light of the circumstances which exist in his particular case.

Eddings v. Department of Labor, 146 Ill.App.3d 62, 496 N.E.2d 1167, 1170, 100 Ill.Dec. 102, 105 (1st Dist. 1986). Pursuant to this standard a person's personal religious beliefs can constitute good cause for refusing a particular job so long as the reasonableness of his actions is shown by his other efforts to secure employment. *See, e.g., Mangan v. Bernardi*, 131 Ill.App.3d 1081, 477 N.E.2d 13, 16, 87 Ill.Dec. 412, 417 (1st. Dist. 1985); *accord Rosenbaum v. Johnson*, 60 Ill.App.3d 657, 377 N.E.2d 258, 18 Ill.Dec. 105 (1st Dist. 1978).

In this case, Mr. Frazee's behavior demonstrated reasonableness in light of his Christian conviction against working on Sunday. He accepted several clerical positions offered by Kelly Services the same month before he refused the position involving Sunday employment. The work assignment, moreover, would not begin for almost two weeks. C. 40. It would not have been unreasonable for him to expect that Kelly Services would offer him other clerical positions in the meantime. Furthermore, before refusing the job he inquired about doing the work except on Sunday. C. 35. Consequently, the manifest weight of the evidence was that Mr. Frazee demonstrated good cause for refusing that particular short-term nonimmediate work assignment.

Illinois law also requires that the work offered must be suitable work for the employee. Here, the evidence in the records does not show that the work was suitable for Mr. Frazee. "In deter-

mining whether or not any work is suitable for an individual, consideration shall be given to the degree of risk involved to his ... morals." Ill.Rev.Stat., Ch. 48, 433. Although no Illinois appellate decisions have been found which interpret this language, the Ohio Supreme Court interpreted the identical language contained in the Ohio unemployment stattute in *Tary v. Board of Review*, 161 Ohio St. 251, 119 N.E.2d 56 (1954). In that case, a Seventh-Day Adventist refused a work referral which involved Saturday employment. Noting that the statute provided that the degree of risk to the claimant's morals was to be considered in determining whether the work was suitable, the Court stated, "The first moral obligation of a person is to remain true to his religious convictions and to conform to what he believes to be his sense of duty." 119 N.E.2d at 59. As the proposed employment involved risks to the claimant's morals, the Ohio Supreme Court ruled that it was not suitable work. 119 N.E.2d at 59. Similarly, the work offered to Mr. Frazee was not suitable because his religious convictions prohibited Sunday work.

Just as the above First Amendment analysis showed that religious freedom is not limited to accepted church tenets and dogma, statutorily protected morals of people are not circumscribed to moral principles founded only on accepted church tenet or dogma. Rather, "moral" has a much broader meaning and encompasses "general principles of right conduct." *See*, *Black's Law Dictionary* 1160 (4th ed. 1968). Mr. Frazee's conviction not to work on Sunday qualifies as a "principle of right conduct" which he was entitled to maintain even while unemployed, as guaranteed by the statute.

CONCLUSION

For the foregoing reasons, plaintiff-petitoner, William Frazee, respectfully requests that this Court allow his petition for leave to appeal so that the judgment of the appellate court may be reviewed and reversed.

Respectfully submitted,

BY /s/ Daniel J. Smith
DANIEL J. SMITH
Attorney at Law
PRAIRIE STATE LEGAL SERVICES
414 Hamilton Blvd., Suite 301
Peoria, Illinois 61602
Telephone: (309) 674-9831

Attorney for Plaintiff-Petitioner
WILLIAM A. FRAZEE

(The Appendix to this Petition contains the Opinion of the Appellate Court of Illinois, Third District, reproduced in this Joint Appendix at pp. 25-32, and the Order of the Appellate Court denying rehearing, reproduced in this Joint Appendix at p. 28.)

66057

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706

February 3, 1988

Mr. Daniel J. Smith
Prairie State Legal Services, Inc.
414 Hamilton Blvd., S#301
Peoria, IL 61602

No. 66057 - William A. Frazee, petitioner, v. Illinois Department of Employment Security, etc., et al., respondents. Leave to appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 25, 1988.

APPELLANT'S BRIEF

(3)

No. 87-1945

IN THE

Supreme Court Of The United States

October Term, 1987

WILLIAM A. FRAZEE,

Appellant,

v.

DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD, Director of the Illinois Department of Employment Security; and BRUCE W. BARNES, Chairman, Board of Review; and KELLY SERVICES,

Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS FOR THE THIRD DISTRICT

BRIEF FOR APPELLANT

David A. French
Counsel of Record
John W. Whitehead
Deborah A. Ausburn
THE RUTHERFORD INSTITUTE
P.O. Box 510
9411 Battle Street
Manassas, VA 22110
(703) 369-0100
Counsel for Appellant

Balmar Legal Publishing Division, Washington, D.C. (202) 659-3610

39 pp

QUESTION PRESENTED

Whether a person who declines to work on Sunday because of a sincerely-held religious conviction must prove that his conviction is a tenet of an established religious sect or body in order to claim the protection of the First Amendment guarantee of free exercise of religion?

LIST OF PARTIES

The parties to the judicial proceedings in the state courts were the Appellant, William A. Frazee, and the Appellees, the State of Illinois Department of Employment Security; Sally Ward, Director of the Illinois Department of Employment Security; and Bruce W. Barnes, Chairman of the Board of Review of the State of Illinois Department of Employment Security. Appellee Kelly Services was a named Defendant in the administrative proceedings before the Referee and the Board of Review, but never appeared in the administrative proceedings or entered an appearance in the judicial proceedings in the state courts.

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Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS FOR THE THIRD DISTRICT

BRIEF FOR APPELLANT

OPINIONS BELOW

The order of the Illinois Supreme Court is not reported and is reprinted in the Joint Appendix, p. 54.

The opinion of the Appellate Court of Illinois for the Third District is reported at *Frazee v. Department of Employment Security*, 159 Ill.App.3d 474, 512 N.E.2d 789 (1987), and is reprinted in the Joint Appendix, pp. 25-32.

The memorandum decision of the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois (Manning, Judge), has not been reported. It is reprinted in the Joint Appendix, p. 23.

The decision of the Board of Review of the State of Illinois Department of Employment Security has not been reported and is reprinted in the Joint Appendix, pp. 17-19.

JURISDICTION

The Appellate Court of Illinois, Third District, entered judgment on August 13, 1987, affirming an order of the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois. The circuit court had affirmed a decision of the appellee, Illinois Department of Employment Security, that William A. Frazee, appellant in this case, should be disqualified from receiving unemployment benefits, despite his claim that such disqualification was an unconstitutional application of the Illinois statute and a violation of his First Amendment free exercise rights.

After the appellate court denied rehearing, Mr. Frazee petitioned for leave to appeal to the Supreme Court of Illinois, which denied the petition on February 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Illinois Unemployment Insurance Act, Section 603; Ill. Ann. Stat. ch. 48, par. 433 (Smith-Hurd 1986).

"§ 603. Refusal of work. An individual shall be ineligible for benefits if he has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the Director, or to accept suitable work when offered him by the employment office or an employing unit, or to return to his customary self-employment (if any) when so directed by the employment office or the Director. . . ."

(The statute is set out in its entirety in the Appendix, p.2a, *infra*).

STATEMENT OF THE CASE

In April 1984, the Appellant William A. Frazee was unemployed. Mr. Frazee had been laid off by his employer, the State of Illinois, as a result of "lack of work" (Joint Appendix [hereinafter Jt. App.] 7). He remained on call, however, to return to his position with the state (Jt. App. 7).

During his unemployment, Mr. Frazee sought to obtain work through Kelly Services, Inc., which assigned him to several temporary jobs (Jt. App. 4). After he completed these jobs, Mr. Frazee spoke to Kelly representatives on April 30, 1984, concerning a temporary job with Designer Warehouse Outlet, a company for which Kelly was recruiting people to work (Jt. App. 5, 10). Kelly informed him that Designer had a job available from Wednesday, May 9, 1984, through Sunday, May 13, 1984 (Jt. App. 5, 10). The work involved retail sales of clothing (Jt. App. 6).

When Mr. Frazee asked if it would be possible to work Wednesday through Saturday, Kelly informed him that he had to be available for the entire five days, Wednesday through Sunday, or he would not be considered for the job (Jt. App. 5). Mr. Frazee answered, "Well, if I had to be available Sunday, I can't. As a Christian I can't do that" (Jt. App. 5), and declined the offer of employment (Jt. App. 7, 15).

When Mr. Frazee subsequently applied for unemployment benefits, the Claims Adjudicator for the Illinois Department of Employment Security determined that he had refused an offer of work due to his religious convictions (Common Law Record [hereinafter C.] 17). Under the Illinois Employment Insurance provisions, a person is ineligible for benefits if he or she refuses, without good cause, an offer of suitable work.[1] The Claims Ad-

---

[1] Ill. Ann. Stat. ch. 48, par. 433 (Smith-Hurd 1986). "An individual shall be ineligible for benefits if he has failed, without good cause, either to apply for avail-

judicator determined that Frazee had not attempted to establish an alternate work schedule and that he had refused suitable work without good cause (*Id.*). Mr. Frazee therefore was disqualified from receiving benefits beginning April 29, 1984 (*Id.*; Jt. App. 15).

Acting *pro se*, Frazee appealed the Claim Adjudicator's determination to the Hearings Referee, citing both his religious conviction against non-essential work on Sunday and the fact that he had not been informed that scheduling adjustments with the prospective employer were possible (C. 25-26). On June 20, 1984, the Referee conducted a hearing in which Mr. Frazee propounded the only testimony (Jt. App. 3-13). His uncontroverted testimony indicated that Kelly did not present any alternate work arrangements that would accommodate his religious convictions (Jt. App. 7). The Referee queried Mr. Frazee concerning his religious beliefs:

> Q. Why can't you work on Sunday?
>
> A. It's just against my faith.
>
> Q. What faith is that?
>
> A. I'm a Christian. . . .
>
> Q. What church you [sic] belong to?
>
> Is that one of your tenets on [sic] the church --
>
> A. No. It's --
>
> Q. -- not to work on Sunday?
>
> A. -- just as a Christian, I feel it's wrong --
>
> Q. Oh, you mean yourself?
>
> A. Yes.
>
> Q. Or as a Christian?
>
> I'm saying, it is not the tenets of your church, that you don't work on Sunday?
>
> A. No.

---

able suitable work when so directed by the employment office or the Director or to accept suitable work when offered him by the employment office or employing unit . . . ." See Appendix for full text of the relevant provisions of the Illinois Unemployment Insurance Act.

> Q. But as a Christian yourself, you feel you shouldn't work on Sunday?
>
> A. Not in a job such as this, whereby profit is involved.
>
> An essential service job such as where life is at stake, I have no objections to that.

(Jt. App. 5-6).

The Referee affirmed the determination of the Claims Adjudicator "on all issues," finding that "Claimant has not established that the work was unsuitable for him." (Jt. App. 15). Mr. Frazee appealed the Referee's decision to the Board of Review, and once more explained his religious convictions and the relevant facts in writing (C. 52-53). No further evidentiary proceedings occurred before the Board of Review, which affirmed the decision of the Referee (Jt. App. 17-19).

The Board based its decision solely on the ground that Mr. Frazee's religious beliefs were "personal" and did not justify a refusal of an offer for suitable work (Jt. App. 18). The Board made no finding that Mr. Frazee's beliefs were a mere pretext to avoid work or that his beliefs were otherwise insincere:

> In this case, the evidence established that the claimant refused an offer of suitable work without good cause, as his personal desire, *no matter how strong or sincerely held*, did not constitute good cause for his refusal to work.

(Jt. App. 18) (emphasis added). The Board further stated that it did not intend "to abridge or to deny Claimant's constitutional right to the free exercise of religion by imposing a disqualification from benefits." (Jt. App. 18-19). However,

> When a refusal of work is based on religious convictions, the refusal must be based upon some tenets or dogma accepted by the individual of some church, sect, or denomination, and such a refusal based solely on an individual's personal belief is personal and non-compelling and does not render the work unsuitable.

(Jt. App. 18).

Mr. Frazee thereafter filed a Complaint for Administrative Review in the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois, alleging, *inter alia*, that the Board of Review decision constituted a denial of his right to freely exercise his religion under the First Amendment to the United States Constitution (C. 1). The Illinois circuit court affirmed the decision (Jt. App. 23), and Mr. Frazee appealed to the Appellate Court of Illinois (Jt. App. 24). Although the appellate court expressly stated that "we do not question the sincerity of Plaintiff," it nonetheless rejected Mr. Frazee's free exercise claim. The court found that his "personal professed religious belief" was insufficient to constitute good cause for his refusal of the offer of work. The court held that in order to receive the protection of the First Amendment, "the injunction against Sunday labor must be found in a tenet or dogma of an established religious sect." Accordingly, inasmuch as Mr. Frazee did not profess to be a member of any such sect, he could not claim the protection of the free exercise clause. The decision of the circuit court was therefore affirmed (Jt. App. 25-32).

Mr. Frazee petitioned the appellate court for rehearing (Jt. App. 33-37), and such petition was denied. Thereafter he filed a Petition For Leave To Appeal with the Supreme Court of Illinois (Jt. App. 39-53), and that court denied his petition on February 3, 1988 (Jt. App. 54). On May 3, 1988, an appeal was filed with this Court, and the Court noted probable jurisdiction on October 3, 1988.

SUMMARY OF ARGUMENT

Under this Court's clear holdings in *Sherbert v. Verner*, 374 U.S. 398 (1963), *Thomas v. Review Board*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987), a state cannot condition receipt of unemployment benefits on the relinquishment of a person's right of free exercise of religion. In the instant case, the Appellate Court of Illinois applied a new test to determine whether a belief is a constitutionally cognizable religious belief. Such test requires that a person be

a member of an established religious sect and profess a religious belief "found in a tenet or dogma" of such sect in order to receive constitutional protection. *Frazee v. Dept. of Employment Security*, 159 Ill.App.3d 474, 478, 512 N.E.2d 789, 792 (1987); Jt. App. 25, 31. Under that test, the court found that Mr. Frazee's beliefs, although "personal professed *religious* belief[s]," *id.* at 475, 512 N.E.2d at 790; Jt. App. 27 (emphasis added), were not entitled to constitutional protection for the reason that he was not a member of "an established religious sect." *Id.* at 478, 512 N.E.2d at 729, Jt. App. 31.

The test adopted by the Illinois court impermissibly excludes many individual beliefs that are undeniably religious from constitutional protection. The test invades the individual right of conscience by making constitutional protection for individual religious belief dependent on the acceptance of such beliefs by others, and by preferring for constitutional protection the beliefs of "established religious sects" to dissenting or emerging beliefs that do not conform with the beliefs or tenets of such sects.

The standards adopted by the Illinois court also operate to prefer the beliefs of highly organized, creedal religions that hold to a uniform body of beliefs and practices to the many religions that do not maintain such uniform beliefs and practices. Moreover, the test requires or permits courts to engage in searching inquiries to determine whether individual religious beliefs are "found" in the tenets of a religious body, and to determine whether individuals are "members" of "established sects." Courts would thus impermissibly entangle themselves in questions of religious doctrine.

The holdings of *Sherbert*, *Thomas*, and *Hobbie* do not condition constitutional protection of religious belief on individual membership in an organized religious body or on individual adherence to the tenets of an "established sect." The analysis applied in those cases governs the instant case, as no constitutionally meaningful distinction can be drawn between Mr. Frazee's adherence to Christianity and the claimants' adherence in those cases to Seventh Day Adventism or the beliefs of the Jehovah's Witnesses.

Under the standards enunciated in those cases, Mr. Frazee's "personal professed religious beliefs" are constitutionally cognizable religious beliefs. The State of Illinois' denial of unemployment benefits to Mr. Frazee burdened his religious conviction prohibiting Sunday work, and the state cannot demonstrate that such denial was necessary to achieve a compelling state interest. The only interests advanced by the state were precisely the same interests that this Court rejected as justification for the invasion of individual religious beliefs in *Sherbert* and *Thomas*. The state's decision denying Mr. Frazee unemployment benefits because he, on the basis of his religious convictions, refused Sunday work therefore impermissibly infringed Mr. Frazee's right to freely exercise his religion under the First Amendment to the United States Constitution.

ARGUMENT

I. THE TEST APPLIED BY THE ILLINOIS COURT TO DENY MR. FRAZEE'S RELIGIOUS BELIEFS CONSTITUTIONAL PROTECTION CANNOT WITHSTAND FIRST AMENDMENT SCRUTINY.

The free exercise clause of the First Amendment forbids a state, acting without a sufficiently compelling interest, from conditioning availability of unemployment benefits on a person's willingness to deny his or her religious beliefs. The settled doctrine enunciated in *Sherbert v. Verner*, 374 U.S. 398 (1963), and applied in *Thomas v. Review Board*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987), establishes a two-part inquiry for determining whether such a condition violates the free exercise clause. First, the court must determine whether the condition burdens a protected religious belief. Second, if such burden exists, the court must determine whether the state can demonstrate that the burden is the least restrictive means necessary to achieve a compelling state interest.

In the instant case, the Appellate Court of Illinois focused its inquiry entirely on the threshold question of whether the state's denial of benefits burdened Mr. Frazee's religious beliefs. The

court made no express effort to balance the respective interests of Plaintiff and the state inasmuch as it found that Mr. Frazee's beliefs were not protected by the free exercise clause.

In reaching this conclusion, the court fashioned a new test, for which it claimed to find support in *Sherbert*, *Thomas*, and *Hobbie*, to determine whether a belief is a protected religious belief under the First Amendment. Under that test, religious beliefs are protected only when (1) the adherent is a member of an established religious sect and (2) the adherent's beliefs are "found" in a tenet or dogma of such sect. *Frazee v. Department of Employment Security*, 159 Ill.App.3d 474, 478, 512 N.E.2d 789, 792 (1987); Jt. App. at 31. Although the court did not question Mr. Frazee's sincerity and acknowledged that his belief against Sunday work was a "personal professed religious belief," it held that such belief was not protected for the sole reason that Frazee did not profess to be a member of a religious sect. Thus, under the court's new test, it was unnecessary to determine whether Mr. Frazee's beliefs conformed to a tenet or dogma of such sect.

This test, while serving to ease the restrictions the free exercise clause places on government's power to adopt and implement neutral and generally applicable regulations,[2] unduly limits the protection for individual religious belief afforded by the free exercise clause and is otherwise at variance with fundamental principles of first amendment religion clause jurisprudence. The lower court's approach accords an individual's religious belief protection only insofar as that belief meets institutional standards. At bottom, the boundaries of protected religious belief are there-

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[2] The lower court at least implicitly invoked this consideration as a justification for its adoption of the above-mentioned test when it opined that chaos would result if every American abstained from Sunday work. *Frazee*, 159 Ill.App.3d 474, 478, 512 N.E.2d 789, 792 (1987); Jt. App. at 25, 31. Presumably, the court believed that permitting Frazee to abstain from Sunday work on account of his religious beliefs and collect unemployment benefits would frustrate the State's neutral objective of encouraging general and individual economic productivity. *Id.* In the instant case, however, such neutral objective, while valid, does not warrant either the denial of Mr. Frazee's request for benefits or the adoption of the court's restrictive test. *See* pp. 22-23, 26, *infra*.

fore determined by the tenets of religious sects or organizations, and any individual deviation from such beliefs is left unprotected. The individual's free exercise rights are thus entirely dependent upon the religious association.

This conception of the scope of the free exercise clause strikes at the core of the protection for individual rights contemplated by that clause. Although the free exercise clause undoubtedly protects established religious organizations, it also separately protects individuals. "Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins*, 367 U.S. 488 (1961); nor penalize or discriminate against individuals *or* groups because they hold religious views abhorrent to the authorities." *Sherbert v. Verner*, 374 U.S. at 402 (emphasis added). "[T]he Free Exercise Clause is written in terms of what government cannot do to the individual . . . ." *Id.* at 412.

Constitutional rights are not derived or acquired from organizations or associations of individuals; they are possessed by individuals *as* individuals. "Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). *See also*, *United States v. Ballard*, 322 U.S. 78 (1944); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 634-35 (1943).

Moreover, in the area of religion, this Court has never confined the protection of the free exercise clause to beliefs that are formally held by religious organizations. The limitation the Court *has* recognized is that the belief must be rooted in religion, rather than in purely secular or philosophical concerns, to receive constitutional protection. *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972).

Individual beliefs can be rooted in religion, however, without being formally associated with an established religious organization. The Court noted this fact 23 years ago when it discussed the religious exemption to the Universal Military Training and Service Act[3] at issue in *United States v. Seeger*, 380 U.S. 163 (1965). Con-

[3] 50 U.S.C. App. § 456(j) (1958); 71 stat. 208.

gress had broadened the exemption by making membership in a pacifist religious sect unnecessary so long as the claimant's opposition to war was based on "religious training and belief." *Id.* at 171. The Court discussed the previous limitation of the exemption and its removal thus:

> The Congress recognized that one might be religious without belonging to an organized church just as surely as minority members of a faith not opposed to war might through religious reading reach a conviction against participation in war. . . . Indeed the consensus of the witnesses appearing before the congressional committees was that individual belief -- rather than membership in a church or sect -- determined the duties that God imposed upon a person in his every day conduct; and that "there is a higher loyalty than loyalty to country, loyalty to God . . . ." Thus, while shifting the test for membership in such a church to one's individual belief the Congress nevertheless continued its historic practice of excusing from armed service those who believe that they owed an obligation, superior to that due the state, of not participating in war in any form.

Id. at 172.

As the Court in *Seeger* recognized, the requirement that an individual's beliefs must conform to the tenets of a religious organization of which he or she is a member excludes many individual beliefs that are undeniably religious. Indeed, many of the world's religions, especially as practiced in the United States, encourage individualized beliefs and practices rather than individual conformity to tenets and creeds formally adopted by a larger religious body. Hinduism, for example, is "not creedal, nor is any particular doctrine, dogma, or practice held to be essential to it." Weightman, "Hinduism," *A Handbook of Living Religions* 179-80 (Hinnells, ed. 1984). "The center of gravity of Hindu religious life is found not in the temple, but in one's own home. All the 'sacraments' are celebrated not in the temple, but at home. Not the community, but the individual is the vehicle of religious ac-

tivity." Von Stientencron, "Hindu Perspectives," *Christianity and the World Religions* 244 (1986).

One reason that accounts for this emphasis on individual belief and practice is the religion's central concept, *dharma*, which is so broad that "the Hindu . . . can view the many attempts at, and forms of, realizing *dharma* as meaningful . . . ." *Id.* at 142.

This broad concept of *dharma* encourages individual differences and a multiplicity of oftimes contradictory religious beliefs.

> Even within Hinduism, one person's sacred scripture is by no means necessarily someone else's. This individual may assign a minor role to a god whom another individual worships with deep devotion as the supreme divinity and Lord of the world. One man teaches that living creatures should never be harmed, while another man's altar drips with the blood of sacrificed goats and buffalos. One believer's Tantric practices are an abomination to others. Even the doctrine of reincarnation, which we think of as being so closely linked with Hinduism, *is not* a universally accepted part of Hindu teaching and faith.

Id. at 138-39. *See also id.* at 241.

Likewise, Buddhism is characterized by almost a complete lack of uniform, required rituals. "[S]ince all beings are different and are at different stages of the way of liberation, there is no code of laws that are equally valid for each one." Bechert, "Buddhist Perspectives," *Christianity and the World Religions* 299 (1986).

Protestant Christianity also has a strong tradition of individualism, which is predicated on the Protestant view that the individual has the responsibility and obligation to decide matters of faith through the exercise of individual conscience. Reichley, *Religion in American Public Life* 63-64 (1985). *See, e.g., Stevens v. Berger*, 428 F. Supp. 896, 902 (E.D.N.Y. 1977) (individuals encouraged to study the Bible and develop personal understanding of its teachings). Early American democratic ideals, which emphasized individual conscience, comported with and reinforced individualized religious belief. Reichley, *supra*, at 168-177. "[R]eligious individualism in the United States could not be contained within the churches, however diverse they were. We have noted the presence of individuals who found their own way in religion even in the 18th Century. Thomas Jefferson said, 'I am a sect myself,' and Thomas Paine, 'My mind is my church.'" Bellah, et al., *Habits of the Heart* 233 (1985).

As commonly understood, Roman Catholicism, as a religion of clearly established dogma, ritual, and practice with a hierarchical organizational structure, has emphasized individual conformity with church authority on religious matters. *See generally*, Ellis, *American Catholicism* (1969). Nonetheless, it is true that with such emphasis the Church permits and recognizes as valid a wide range of disparate beliefs and practices. As one scholar has noted, "[T]here are sometimes sharper divisions *within* the Roman Catholic Church than there are between certain Catholics and certain Protestants." McBrien, "Roman Catholicism: E Pluribus Unum," *Religion in America: Spirituality in a Secular Age* 181 (Douglas and Tipton, eds., 1983).

In modern America, Judaism encompasses many differing practices and beliefs. Orthodox Judaism tends to emphasize formal practices and beliefs, particularly observing the *mitzvot*, or religious commandments covering many aspects of life. However, although Orthodox scholars agree on some fundamental religious rules, in other areas "the lack of a central authority or rabbinic body in Orthodox life makes it virtually impossible to discern a consensus . . . ." Rosenthal, *Four Paths to One God* 66 (1973). Other forms of Judaism accommodate even a higher amount of individual difference. In Conservative Judaism, ritual observances vary widely among groups and individuals, Rosenthal, *id.* at 191. Reform Judaism regards the Torah as a guide rather than a governor. "The individual, in short, must decide whether or not to observe a *mitzvah* . . . ." *Id.* at 128. Reconstructionism is a uniquely American approach, according to which "the *individual* Jew must decide *voluntarily* whether or not he will abide by Jewish practices." *Id.* at 241.

These brief examples[4] demonstrate, not surprisingly, that differences in individual and group religious beliefs abound.[5] Not only do differences exist between individuals' beliefs and the tenets of the larger religious body or association of which they are a member, but differences exist as well between individual beliefs and practices within certain religions and sects, and between the beliefs and practices of individuals of different religions and sects. Further, the manner in which the nature of individual belief is itself viewed varies according to, and within, religious system. In some religions or sects, individual variation from a corpus of doctrine or dogma is more likely to be viewed as heretical. In other religions or sects, such a formal corpus does not exist, and variation in individual belief and practice is more likely to be accepted as normative.

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[4] The religion of Islam has no required system of beliefs, but does have required rituals:

> A Muslim comes to know his religious identity not through creedal formulas, but through certain actions that he carries out the same way his neighbor does, and usually together with him. There is nothing in Islam comparable to the Christian creeds. In their stead, Muslims acknowledge five universally binding fundamental obligations, the so-called "pillars" of Islam.

Van Ess, "Islamic Prospectives," *Christianity and the World Religions* 46 (1986).

Zoroastrianism is another religion that has prescribed rituals, which include such activity as prayer five times daily in the presence of fire, wearing a sacred cord knotted in a specified way over a sacred shirt and ritual ablutions before prayer. Boyce, "Zoroastrianism," *A Handbook of Living Religions* 179-80 (Hinnells, ed. 1984). Jainism, a religious tradition in India, also has required ascetic practices, established holy days, and formal religious rites. Folkert, "Jainism," *id.* at 265-72.

[5] A multiplicity of sects and religions are extant, of course, in the United States. According to one recent survey, 1,400 distinct religious groups exist in America. Melton and Moore, *The Cult Experience: Responding to the New Religious Pluralism* 18 (1982).

Such differences cannot serve as a basis upon which to distinguish between which beliefs are to be accorded constitutional protection without doing violence to a fundamental purpose of the religion clauses, which is to safeguard the individual right to believe according to the dictates of conscience. The test of the Illinois court operates to protect only individual beliefs that conform with the tenets of religious organizations. By thus making the difference between individual non-conforming religious belief and the tenets of an established religious organization the benchmark in determining which beliefs are constitutionally protected, such test offends the free exercise clause.

If individual religious beliefs must conform with the teachings of an established religious organization in order to receive protection under the free exercise clause, such protection is dependent on the acceptability of the individual's beliefs to others. The individual right of conscience, unlike the right to engage in conduct, is absolute, however, and cannot be subject to the beliefs and convictions of others. As the Court noted in *Thomas*, *supra*, when it found that petitioner's religious beliefs need not accord with another adherent's beliefs of the same sect in order to receive constitutional protection:

> [R]eligious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection.... Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill-equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly non-religious in motivation as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and *the guarantee of free exercise is not limited to beliefs which are shared by all members of a religious sect.*

450 U.S. at 714-15 (emphasis added).

Once government conditions protection of individual belief on the acceptance of those beliefs by others, it necessarily has acted to prefer particular religious beliefs or religions. Accord-

ing constitutional protection to only those religious beliefs held as tenets by established religious organizations prefers such established beliefs to individual religious beliefs that have not acquired such status. *See* Choper, "Defining 'Religion' in the First Amendment" (982 *U.Ill. L.Rev.* 579, 580 ("[A]ny definition of religion for consti utional purposes that excludes certain beliefs (or groups) that are reasonably perceived or characterized as being religious by those who hold them (or belong to them) may be fairly viewed as a judicial preference of some 'religions' over others.").

In the instant case, the test adopted by the lower court in effect permits persons who abstain from work in conformance with the tenets of their chosen religious body to collect unemployment benefits while denying those benefits to other persons solely because their religious beliefs do not conform to those held by such a body. Thus, in the same degree as in the test oath invalidated by the Court in *Torcaso v. Watkins*, 367 U.S. 488 (1961), the test of the Illinois court places "[t]he power and authority of the State . . . on the side of one particular sort of believers . . . ." *Id.* at 490. Under the free exercise clause, individuals cannot be required to hold any particular set of religious beliefs in order for those beliefs to receive constitutional protection; rather, those beliefs must merely be characterized as religious in order to receive such protection.

The test adopted by the Illinois court operates to grant impermissible preferences in several other manners. Granting protection only to "dogma of . . . established religious sect[s]" not only discriminates between particular individual religious beliefs, but also likely would eventuate in discriminatory treatment of entire categories of individuals on the basis of religion. As was demonstrated previously, many religions do not maintain a corpus of doctrine by which to measure orthodoxy, or a standard set of prescribed practices by which to measure individual conduct. A Buddhist or Hindu, for example, would have great difficulty demonstrating that his or her individual practices or beliefs conform with the tenets of an established religious sect. The very nature of these religions requires an individual progression that is not dependent on a central or uniform body of beliefs or practices.

See pp. 11 - 12, *supra*. Under the test adopted by the Illinois court, adherents of these and similar religions would be clearly disadvantaged relative to creedal, highly organized religions that maintain uniform, prescribed rules for individual conduct.

In addition, the test by its very terms protects only tenets of "established" religious sects, thereby ensuring that existing, prominent religions will receive preferred constitutional protection. The test thus operates to "establish" prominent, existing religions and sects to the detriment of small dissenting or new groups. By way of illustration, under this test Martin Luther's nailing of the 95 theses on the door of Castle Church in Wittenberg in 1517 would not have received constitutional protection. The injunctions contained in the 95 theses were not "found in the tenets or dogmas of an established religious sect," for they did not accord with the tenets of the Roman Catholic Church, the only established sect of that time in Europe. Because religious dissenters and adherents of emerging religions or sects would by definition not possess beliefs that are found in the tenets of an established religious body, their religious beliefs would not receive constitutional protection under the test adopted by the Illinois court. In short, the test adopted by the Illinois court would operate to impermissibly disadvantage religious dissenters and adherents of emerging religions or sects.

The requirement that the individual belief be "found in the tenets of dogmas in an established religious sect" poses another related problem under the First Amendment. Such standard invites, if not requires, courts to scrutinize individual beliefs to determine whether the beliefs conform to the tenets of an established religious sect. Inquiries concerning the meaning and interpretation of both the tenets of the sect and the individual religious belief would be required in order to determine whether the individual belief was "found" in such a tenet. Courts would thus entangle themselves in questions of religious doctrine, determining the consistency or validity of various religious beliefs and claims. Similar dangers would arise when courts undertook to determine who were "members" of "established" sects. These questions themselves often involve matters of ecclesiastical law and practice and

religious doctrine. *Jones v. Wolf*, 443 U.S. 595, 607-09 (1979); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). The First Amendment, however, forbids courts from determining the consistency or validity of religious beliefs. *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 426 U.S. 696 (1976); *Mary Elizabeth Blue Hill Memorial Presbyterian Church*, 393 U.S. 440 ; *United States v. Ballard*, 322 U.S. 78 (1944); *cf., Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Crowder v. Southern Baptist Convention*, 828 F.2d 718 (11th Cir. 1987). *See also*, *Thomas v. Review Board*, 450 U.S. 707, 715 (1980) ("Courts are not arbiters of scriptural interpretation").

The scope of a court's inquiry in determining whether a particular belief is protected under the free exercise clause must be strictly circumscribed in order to avoid impinging upon these constitutional imperatives. As the Court noted in *Thomas* in addressing a question quite similar to that of the instant case:

> The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion.

450 U.S. at 715-16. The standards adopted by the Illinois court far exceed this limited inquiry by requiring or permitting searching inquiries into the consistency and validity of religious beliefs. Such standards cannot, therefore, withstand First Amendment scrutiny.

In the sensitive area of determining which beliefs are constitutionally protected under the free exercise clause, courts must at least ensure that the standards they adopt to inform their inquiry do not themselves contravene established principles of the religion clauses. The test applied by the Illinois court to deny Mr. Frazee's religious beliefs constitutional protection does not comport with such principles, and the Illinois court erred as a matter of law in its application in the instant case.

II. THE HOLDING OF THE ILLINOIS APPELLATE COURT IS BASED ON AN IMPROPER READING OF THIS COURT'S DECISIONS IN *SHERBERT v. VERNER*, 374 U.S. 398 (1963); *THOMAS v. REVIEW BOARD*, 450 U.S. 707 (1981); AND *HOBBIE v. UNEMPLOYMENT APPEALS COMMISSION*, 480 U.S. 136 (1987).

A. The Holdings of *Sherbert*, *Thomas*, and *Hobbie* Do Not Condition Constitutional Protection of Religious Beliefs on Individual Membership in an Organized Religious Body or on Adherence to the Tenets of an "Established Sect."

The Appellate Court of Illinois, in formulating its requirement that a religious belief must be "found in a tenet or dogma of an established religious sect" in order to merit constitutional protection, purported to rely on this Court's decisions in *Sherbert v. Verner*, 374 U.S. 398 (1963), *Thomas v. Board of Review*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987), stating:

> Our examination of the foregoing cases reveals that a common thread was running through each case, namely, that in each case the claimant was a member of an established religious sect or church; that each of the claimants in refusing to work at a particular place or time was exercising what was believed to be a tenet, belief or teaching of an established religious body.

Frazee, 159 Ill.App.3d at 477; 512 N.E.2d at 791; Jt. App. at 29.

In none of those cases, however, did this Court find that membership in a sect was a necessary condition for protection of individual religious beliefs. It is important to distinguish between such membership as a necessary condition for, and as one relevant factor in determining, a constitutionally protected religious belief. Membership in an organized religious body or adherence to a belief system commonly recognized as distinctive of an identifiable religious sect can be corroborative of the genuineness and sin-

cerity of a claimant's religious beliefs. *Cf., Wisconsin v. Yoder*, 406 U.S. 205, 216-17 (1972) (citing long-standing historic practice and way of life shared by an organized group and based on Biblical injunction as evidence of religious conviction).

However, such membership and adherence cannot be a requisite for constitutional protection of religious beliefs. Freeman, "The Misguided Search for the Constitutional Definition of 'Religion,'" 71 *Geo. L.J.* 1519, 1553-54 (1983) (arguing that no essential attribute of religion exists: "A mystic might avoid affiliation with any religious organization; a primitive religion might sustain itself without any literature; and a Buddhist might not worship, pray, celebrate holy days, or practice any rituals."); Greenawalt, "Religion as a Concept in Constitutional Law" 72 *California L. Rev.* 753, 767-68, 768 n.58, 785 (1984) ("A religious objector's church membership is superfluous to the religiousness of his claim (though membership may help establish his sincerity and bear on whether an exemption would be tolerable)"). *Cf., Welsh v. United States*, 398 U.S. 408 (1970); *United States v. Seeger*, 380 U.S. 163 (1965); *Malnak v. Yogi*, 592 F.2d 197, 209 (3d Cir. 1979) (Adams, J, concurring); *Africa v. Commonwealth of Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981). *See* pp. 9-10, 15-18 supra.

Accordingly, the Court emphasized in Thomas that in determining whether a belief is a constitutionally cognizable religious belief, a reviewing court has only a "narrow function." 450 U.S. at 716. The relevant inquiry is not whether the claimant's belief can be "found in a tenet or dogma of an established religious sect," but only whether the claimant has "an honest conviction that such work was forbidden by his religion." *Id.*

B. Mr. Frazee's Religious Beliefs Cannot Be Distinguished for Constitutional Purposes from Those of Sherbert, Thomas, and Hobbie.

Despite the clear language of *Thomas*, the Illinois court termed Seventh Day Adventism and Jehovah's Witnesses "established religious sects," and deemed this alleged fact to be the "dividing line" that distinguished Frazee's claims from those of Sherbert,

Thomas, and Hobbie. The use of the phrase "established religious sects" could serve to distinguish Frazee from those claimants in one of three possible manners, none of which has merit: first, to distinguish between persons who are members of organized religious bodies and persons who, though not formally associated with a religious organization, are adherents of religious belief systems; second, to distinguish between the beliefs of a general religion, such as Christianity, and the beliefs of dissenting or smaller groups, such as the Amish or Presbyterians, within the general religion; and third, to distinguish between entirely separate religions that have relatively larger numbers of adherents, such as Christianity, and those that have smaller numbers of adherents, such as Zoroastrianism.

As to the first ground, although the record before the Court does not demonstrate that Mr. Frazee is a "member" of an organized religious body, no such finding was made by the Court with respect to Sherbert, Thomas, or Hobbie. The Court in each respective case made reference only to the fact that those claimants adhered to a particular religious belief system, and did not discuss whether they were members of an "established religious body" or social organization such as a local church or religious congregation. Just as those claimants were found to be adherents of a particular identifiable religious belief system, Mr. Frazee is an adherent of such a religious belief system -- Christianity.

As to the second ground, although Mr. Frazee has professed no adherence to the beliefs of a smaller or dissenting group within Christianity, his beliefs cannot be denied constitutional protection on such ground. Such denial would impermissibly prefer the particular religious beliefs of small or dissenting groups to those of other persons who adhered only to the particular beliefs of the general religion. Similarly, to deny Mr. Frazee's beliefs constitutional protection on the third ground -- merely because he does not adhere to a religion that has a smaller number of adherents -- would impermissibly prefer such religions over religions having larger numbers of adherents. Thus, any of the possible uses of the

term "established sect" cannot be used to distinguish the instant case from *Sherbert*, *Thomas*, and *Hobbie*.

Upon close examination, the purported "dividing line" between Frazee and the claimants in *Sherbert*, *Thomas*, and *Hobbie*, simply cannot be discerned. No constitutionally meaningful distinction can be drawn between Frazee's adherence to Christianity and those claimants' adherence to Seventh Day Adventism or the beliefs of the Jehovah's Witnesses.

C. The State Interest Is Not Relevant in Delimiting the Boundaries of a Constitutionally Cognizable Religious Belief.

The Illinois court apparently attempted to fashion a "dividing line" between Mr. Frazee and the claimants in *Sherbert*, *Thomas*, and *Hobbie* as a result of its concern that chaos would result "if all Americans were to abstain from working on Sunday." *Frazee*, 159 Ill.App.3d at 478, 512 N.E.2d at 792; Jt. App. at 31. The most striking aspect of the lower court's opinion is that the court apparently believed that the state interest in avoiding "chaos" had relevance for determining the threshold question of whether Mr. Frazee had a constitutionally cognizable religious belief. Under the inquiry adopted by the Court in *Sherbert*, *Thomas*, and *Hobbie*, the state interest has relevance only after a determination has been made that a religious belief has been infringed or burdened by state action. The state interest must then be of a sufficiently compelling nature to justify the burden on religious belief. The Illinois court failed to follow this established analysis.

Underlying the Illinois court's discussion of the "American way of life" and the chaos that would result from universal abstinence from Sunday work may be a more general concern for the state's interest in preserving the public welfare (*e.g.* general and individual economic productivity and, perhaps, public safety) through the adoption and implementation of neutral and generally applicable regulations. Broad religious exemptions from such

neutral regulations may pose the danger that important state objectives would be frustrated.[6]

Whatever relevance such concerns may have in other contexts for determining the threshold question of whether a claimant has a cognizable religious belief, they have no relevance for such question in the instant case. Like the statutes at issue in *Sherbert*, *Thomas*, and *Hobbie*, the Illinois Unemployment Insurance Act can only be viewed as "intended to provide a benefit to a limited class of otherwise disadvantaged persons." *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stephens, J., concurring), and is thus unlike many other neutral laws of general applicability. Under the statutory scheme at issue in the instant case, recognizing Mr. Frazee's religious belief as good cause for refusal to accept an offer of work only ensures that he, as a religious believer, does not receive treatment unequal to that accorded other workers who are excused from accepting offers of work on non-religious grounds.

Under the free exercise analysis that governs the instant case, therefore, the state interest is not determinative of the threshold question of whether Mr. Frazee has a constitutionally cognizable religious belief. The analysis applied by the Court in *Sherbert*, *Thomas*, and *Hobbie* governs the instant case, and the Illinois court erred in failing to follow and apply such analysis to Mr. Frazee's claims.

III. THE DECISION OF THE STATE OF ILLINOIS DENYING MR. FRAZEE UNEMPLOYMENT BENEFITS INFRINGED HIS RIGHT TO FREE EXERCISE OF RELIGION UNDER THE FIRST AMENDMENT.

In considering whether the state's denial of unemployment benefits impermissibly infringed Mr. Frazee's right of free exercise, under *Sherbert*, *Thomas*, and *Hobbie* the first relevant question is whether Mr. Frazee refused the offer of work "because of an honest conviction that such work was forbidden by his religion."

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6 No such state interest would be frustrated, however, by granting Mr. Frazee unemployment benefits in the instant case. See, pp. 26, *infra*.

Thomas, 450 U.S. at 716. Although his belief must have been rooted in religion, rather than purely philosophical or secular considerations, *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972), so long as Mr. Frazee's belief was not "so bizarre, so clearly non-religious in motivation," it was entitled to protection under the free exercise clause. *Thomas*, 450 U.S. at 715.

Mr. Frazee's sincerity in his belief that his religion forbade non-essential Sunday work has not been questioned at any point in the proceedings of the instant case. The Board of Review merely declined to accept his belief as religious "no matter how strong or sincerely held." (Jt. App. 18). The Illinois appellate court specifically stated that "we do not question the sincerity of Plaintiff." *Frazee*, 159 Ill.App.3d at 477, 512 N.E.2d at 791; Jt. App. at 29.

Moreover, Mr. Frazee's belief was not "so bizarre, so clearly non-religious in motivation" as to be excluded from constitutional protection. Mr. Frazee's belief against non-essential Sunday work is clearly rooted in religion. Even the Illinois appellate court, before taking note of the long history of the belief against Sunday labor, termed Mr. Frazee's belief a "personal professed *religious* belief." *Frazee*, 159 Ill.App.3d at 475; 512 N.E.2d at 790; Jt. App. at 27 (emphasis added). This history is corroborative of the religious nature of Mr. Frazee's belief, and a brief outline of the antecedents and tradition of the "Christian Sabbath" belief is therefore in order.

The earliest reference to the Sabbath is contained in the Decalogue, Exodus 20:8. The Sabbath observance became one of the most important restrictions of the many Jewish laws. The injunction against Saturday work applied not only to the land owner, but to all servants and livestock. Exodus 23:12; Deuteronomy 5:14. The reason given for the Sabbath restriction was that Jehovah required it. Exodus 20:8.

Various Jewish groups developed strict guidelines for observance of the Sabbath. The Essenes, for example, carefully observed the prohibition against lighting a fire and cooking on the Sabbath. Webster, *Rest Days: The Christian Sunday, The Jewish Sabbath and Their Historical and Anthropological Prototypes* 257

n.3 (1916). The Jewish *Mishna* outlined thirty-nine categories of prohibited actions, such as tying certain kinds of knots or traveling beyond a specified distance. *Id.* at 263-64.

The first Christians, many of whom were converted Jews, began to gather on Sunday, the day of the resurrection, to "break bread" and give thanks to God. *Id.* at 267. Early Church Fathers eventually declared that Christians should abstain on Sunday from secular duties and occupations. *Id.* at 269-70. As Christianity moved into the Middle Ages, Sunday observances began to be viewed as the Jewish Sabbath transferred from the seventh to the first day of the week, complete with Biblical injunctions. *Id.* at 270-71.

In England, various monarchs reinforced these teachings by prohibiting certain Sunday activities. In 1237, Henry III closed the markets on Sunday, and in 1354, Edward III banned the Sunday showing of wools at the staple. Henry VI prohibited Sunday fairs in churchyards in 1444, and in 1448 banned all fairs, markets, and the showing of any merchandise. Lewis, *A Critical History of Sunday Legislation* 82-108 (1920).

The injunction against Sunday work was such a dominant religious belief that when the first colonists came to America, they brought with them this tradition of English laws, and the specific prohibition of Charles II, passed in 1677. That statute, which prohibited anyone from doing "any worldly labor or business or work of their ordinary callings upon the Lord's day," was the law of the colonies until the Revolution. *McGowan v. Maryland*, 366 U.S. 420, 432 (1961). Each colony also adopted its own law restricting secular activities on Sunday. *Id.* at 433.

The fact, however, that the Christian observance of a Sunday Sabbath is no longer prevalent either in American society generally or among many Christians or Christian sects does not make Mr. Frazee's belief any less religious. Individual religious beliefs are often not amenable to changing social convention, nor should they be compelled to change to preserve a majority sense of "the American way of life." In view of Mr. Frazee's unquestioned sincerity and the clear religious origin and tradition of the

"Christian Sabbath," his belief against non-essential Sunday work clearly merits constitutional protection as a religious belief.[7]

Under the holdings of *Sherbert*, *Thomas*, and *Hobbie*, the state's denial of unemployment benefits on the ground that Mr. Frazee's religious conviction did not constitute good cause for his refusal of an offer of work constituted a burden on the exercise of his religious beliefs. The only question that remains is whether the State of Illinois can demonstrate that its decision to deny Mr. Frazee benefits was the least restrictive means necessary to achieve a compelling state interest. *Thomas*, 450 U.S. at 718.

The only interest advanced by the state in the Illinois appellate court or considered by that court pertained to the possible depletion of the state's unemployment trust funds (Brief and Argument for Defendants-Appellees, p. 11) and the alleged "chaos" that would result "if all Americans were to abstain from working on Sunday." *Frazee*, 159 Ill.App.3d at 478, 512 N.E.2d at 792; Jt. App. at 31. These proffered interests rest on the gratuitous assumption that widespread unemployment and employee refusal of Sunday work would be induced by permitting persons to refuse offers of suitable work on religious grounds and still collect unemployment benefits. The State of Illinois, however, has not offered any evidence to support these conclusions, and therefore cannot demonstrate that its decision denying Mr. Frazee benefits was the least restrictive means necessary to achieve a compelling state interest. Indeed, these same unsupported assumptions were advanced by the respective states in *Sherbert* and *Thomas*, *see Thomas*, 450 U.S. at 718-19; *Sherbert*, 374 U.S. at 407, as grounds to deny the religious claimant benefits and were expressly rejected by the Court. *Thomas*, 450 U.S. at 719, *Sherbert*, 374 U.S. at 407-08.

Mr. Frazee's sincerely-held beliefs were not "so bizarre, so clearly non-religious" as to be excluded from constitutional protec-

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[7] Mr. Frazee's belief against and refusal to perform Sunday work does not, of course, involve conduct that could be validly proscribed by the state. *Cf., Employment Division, Department of Human Resources v. Smith*, 485 U.S. ___, 99 L.Ed.2d 753 (1988).

tion under the free exercise clause, and those beliefs were burdened by the state's decision to deny him benefits. Inasmuch as the state cannot show that its decision was the least restrictive means to achieve a compelling state interest, such decision impermissibly infringed Mr. Frazee's right to freely exercise his religion under the First Amendment.

CONCLUSION

For all the reasons set forth above, Appellant respectfully requests that this Court reverse the judgment of the Appellate Court of Illinois, and remand the cause to the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois, for a determination of the amount of benefits, including interest, owing to Appellant William A. Frazee.

Respectfully submitted,

David A. French
Counsel of Record
John W. Whitehead
Deborah A. Ausburn
THE RUTHERFORD INSTITUTE
9411 Battle Street
P.O. Box 510
Manassas, VA 22110
(703) 369-0100

Counsel for Appellant

APPENDIX

Illinois Unemployment Insurance Act, Section 500; Ill. Ann. Stat. ch. 48, par. 409 (Smith-Hurd 1986).

§ 500. Eligibility for benefits. An unemployed individual shall be eligible to receive benefits with respect to any week only if the Director finds that:

A. He has registered for work at and thereafter has continued to report at an employment office in accordance with such regulations as the Director may prescribe, except that the Directory may, by regulation waive or alter either or both of the requirements of this subsection as to individuals attached to regular jobs, and as to such other types of cases of situations with respect to which he finds that compliance with such requirements would be oppressive or inconsistent with the purposes of this Act, provided that no such regulation shall conflict with Section 400 of this Act.[1]

B. He has made a claim for benefits with respect to such week in accordance with such regulations as the Director may prescribe.

C. He is able to work, and is available for work; provided that during the period in question he was actively seeking work and he has certified such on a form provided by the Department listing the places at which he has sought work . . . .

D. If his benefit year begins prior to July 6, 1975 or subsequent to January 2, 1982, he has been unemployed for a waiting period of 1 week during such benefit year. If his benefit year begins on or after July 6, 1975, but prior to January 3, 1982, and his unemployment continues for more than three weeks during such benefit year, he shall be eligible for benefits with respect to each week of such unemployment, including the first week thereof. An individual shall be deemed to be unemployed within the meaning of this subsection while receiving public assistance as remuneration for services performed on work projects financed from funds made available to government agencies for such purpose.

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[1] Paragraph 400 of this chapter.

Illinois Unemployment Insurance Act, Section 603; Ill. Ann. Stat. ch. 48, par. 433 (Smith-Hurd 1986).

§ 603. Refusal of work. An individual shall be ineligible for benefits if he has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the Director, or to accept suitable work when offered him by the employment office or an employing unit, or to return to his customary self-employment (if any) when so directed by the employment office or the Director. Such ineligibility shall continue for the week in which such failure occurred and, thereafter, until he has become reemployed and has had earnings equal to or in excess of his current weekly benefit amount in each of four calendar weeks which are either for services in employment, or have been or will be reported pursuant to the provisions of the Federal Insurance Contribution Act[2] by each employing unit for which such services are performed and which submits a statement certifying to that fact.

In determining whether or not any work is suitable for an individual, consideration shall be given to the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.

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[2] 26 U.S.C.A. § 3101 et seq.

APPELLEE'S

BRIEF

No. 87-1945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM A. FRAZER,

Appellant,

v.

DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD, Director of the Illinois Department of Employment Security; BRUCE W. BARNES, Chairman, Board of Review; and KELLY SERVICES,

Appellees.

On Appeal From The Appellate Court Of Illinois, Third Judicial District

BRIEF FOR STATE APPELLEES

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROBERT J. RUIZ *
Solicitor General, State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3813
Attorneys for State Appellees

DIANE CURRY GRAPSAS
MARCY I. SINGER
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2566
Of Counsel

* Counsel of Record

Printed by Authority of the State of Illinois (P.O. 34322—55—12-22-88)

QUESTION PRESENTED

Whether a state agency violates the Free Exercise Clause of the First Amendment when it denies unemployment benefits to a person whose refusal of Sunday work has been explained in terms insufficient to establish its religious significance and thus factually determined to be personal.

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On Appeal From The Appellate Court Of Illinois, Third Judicial District

BRIEF FOR STATE APPELLEES

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.

Illinois Unemployment Insurance Act
Ill. Rev. Stat. Ch. 48, par. 314 (1987)

§ 204. "Employing unit" means any individual or type of organization, including the State of Illinois, each of its political subdivisions and municipal corporations, and each instrumentality of any one or more of the foregoing; and any partnership, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January 1, 1986, had in its employ one or more individuals performing services for it within this State. All individuals performing services within this State for any employing unit which maintains two or more separate establishments within this State shall be deemed to be employed by a single employing unit for all purposes of this Act.

Illinois Unemployment Insurance Act
Ill. Rev. Stat. Ch. 48, par. 420 (1987)

§ 500. Eligibility for benefits. An unemployed individual shall be eligible to receive benefits with respect to any week only if the Director finds that:

A. He has registered for work at and thereafter has continued to report at an employment office in accordance with such regulations as the Director may prescribe, except that the Director may, by regulation, waive or alter either or both of the requirements of this subsection as to individuals attached to regular jobs, and as to such other types of cases or situations with respect to which he finds that compliance with such requirements would be oppressive or inconsistent with the purposes of this Act, provided that no such regulation shall conflict with Section 400 of this Act.[1]

B. He has made a claim for benefits with respect to such week in accordance with such regulations as the Director may prescribe.

C. He is able to work, and is available for work; provided that during the period in question he was actively seeking work and he has certified such a form provided by the Department listing the places at which he has sought work; however, nothing in this subsection shall limit the Director's approval of alternate methods of demonstrating an active search for work based on regular reporting to a trade union office. . .

[1] Paragraph 400 of this Chapter.

Illinois Employment Insurance Act
Ill. Rev. Stat. Ch. 48, par. 433 (1987)

§ 608. Refusal of work. An individual shall be ineligible for benefits if he has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the Director, or to accept suitable work when offered him by the employment office or an employing unit, or to return to his customary self-employment (if any) when so directed by the employment office or the Director. Such ineligibility shall continue for the week in which such failure occurred and, thereafter, until he has become reemployed and has had earnings equal to or in excess of his current weekly benefit amount in each of four calendar weeks which are either for services in employment, or have been or will be reported pursuant to the provisions of the Federal Insurance Contributions Act[1] by each employing unit for which such services are performed and which submits a statement certifying to that fact.

In determining whether or not any work is suitable for an individual, consideration shall be given to the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.

Notwithstanding any other provisions of this Act, no work shall be deemed suitable and benefits shall not be

denied under this Act to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

If the position offered is vacant due directly to a strike, lockout, or other labor dispute; if the wages, hours or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; if, as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization; if the position offered is a transfer to other work offered to the individual by the employing unit under the terms of a collective bargaining agreement or pursuant to an established employer plan, program, or policy, when the acceptance of such other work by the individual would require the separation from that work of another individual currently performing it.

[1] 26 U.S.C.A. § 3101 *et seq.*

STATEMENT OF THE CASE

In April 1984, the appellant William A. Frazee was unemployed and receiving unemployment insurance benefits. (Jt. App. 7).[1] Mr. Frazee had a contract with Kelly Services,[2] an employment agency in Illinois, which assigned him to various jobs in April, 1984. (Jt. App. 4). On April 30, 1984, Mr. Frazee was offered a job with the Designer

[1] "Jt. App." refers to the Joint Appendix. "C." refers to the Common Law Record.

[2] Kelly Services is an "employing unit" as defined under the Illinois Unemployment Insurance Act. Ill. Rev. Stat. ch. 48, ¶ 314 (1987).

Warehouse Outlet, an out-of-state company for which Kelly Services was recruiting temporary employees. (Jt. App. 5). The job, for which Mr. Frazee was qualified, provided employment for a five day work week commencing Wednesday and extending through Sunday. (Jt. App. 5). Mr. Frazee declined the employment opportunity. (Jt. App. 7). Thereafter, his unemployment benefits were discontinued based upon a determination by the claims adjudicator that he refused an offer of suitable work without good cause. (C. 17).[3]

An administrative hearing was initiated at Mr. Frazee's request to review the determination by the claims adjudicator. During the hearing, at which Mr. Frazee appeared *pro se*, he testified that he declined temporary employment because it would have required him to work on Sunday. The following exchange took place between the hearing referee and Mr. Frazee. (Jt. App. 5-6).

Q. Why can't you work on Sunday?

A. It's just against my faith.

Q. What faith is that?

A. I'm a Christian.

Q. Well, I get—

A. Well, I'm a Christian as—

Q. What church you [sic] belong to?
Is that one of your tenets on [sic] the church—

A. No. It's—

[3] "An individual shall be ineligible for benefits if he has failed, without good cause, either to apply for available suitable work when so directed by the employment office or the Director or to accept suitable work when offered him by the employment office or employing unit . . . ." Ill. Rev. Stat. ch. 48, ¶ 433 (1987).

Q. —not to work on Sunday?

A. —just as a Christian, I feel it's wrong—

Q. Oh, you mean yourself?

A. Yes.

Q. Or as a Christian?
I'm saying, it is not the tenets of your church, that you don't work on Sunday.

A. No.

Q. But as a Christian yourself, you feel you shouldn't work on Sunday?

A. Not in a job such as this, whereby, profit is involved. An essential service job such as where life is at stake, I have no objections to that.

Before closing the hearing, the referee gave Mr. Frazee an opportunity to more fully explain his religious beliefs and why they rendered the job unsuitable. Mr. Frazee added nothing more. The referee concluded that the "claimant refused an offer of suitable work without good cause" and that "the claimant has not established that the work was unsuitable for him." (Jt. App. 15).

Mr. Frazee appealed that decision to the Board of Review, Department of Employment Security. (Jt. App. 17). The Board paraphrased the testimony set out above; "the claimant testified that his refusal to work on Sundays was not based upon any specific religious or church tenet but 'just as a Christian, I feel it's wrong.' " (Jt. App. 18). The Board then stated that "we have carefully reviewed the record of the evidence in this matter including the transcript of the testimony submitted . . . [and] also carefully considered the arguments and contentions set forth by the appellant. . . ." (Jt. App. 17-18). The Board, which issued the final administrative decision, concluded:

In this case, the evidence established that the claimant refused an offer of suitable work without good cause, as his personal desire, no matter how strong or sincerely held, did not constitute good cause for his refusal of work. When a refusal of work is based on religious convictions, the refusal must be based upon some tenets or dogma accepted by the individual of some church, sect, or denomination, and such a refusal based solely on an individual's personal belief is personal and noncompelling and does not render the work unsuitable. It is not the purpose of the Act nor of the Board of Review to abridge or to deny the claimant's constitutional right to the free exercise of religion by imposing a disqualification from benefits. However, other than his own self-serving testimony, the claimant has presented no corroborative evidence to establish that working on a Sunday was unsuitable for him.

(Jt. App. 18-19). Accordingly, the claim for benefits was denied. (Jt. App. 19).

On administrative review the Circuit Court of Peoria County, Illinois, found that the decision of the Illinois Department of Employment Security was not against the manifest weight of the evidence and affirmed that decision.[4] (Jt. App. 23). The Illinois Appellate Court, Third District, affirmed the circuit court's decision. (Jt. App. 26-31). The Appellate Court denied Mr. Frazee's petition for rehearing (Jt. App. 38) and, subsequently, the Illinois Supreme Court denied his petition for leave to appeal. (Jt. App. 54). Mr. Frazee was represented by counsel during all judicial proceedings.

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[4] In Illinois this is the standard of review applied to a final administrative decision. Ill. Rev. Stat. ch. 110, ¶ 3-110 (1987).

SUMMARY OF ARGUMENT

As Mr. Frazee correctly notes, under *Sherbert v. Verner*, 374 U.S. 398 (1963), *Thomas v. Review Board*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987), a state cannot condition receipt of unemployment benefits on the relinquishment of a person's right of free exercise of religion. The Department does not contest the validity of this proposition. Instead, it is the Department's position that Mr. Frazee failed to meet the modest burden of proof necessary to establish the religious significance of his beliefs so as to implicate the Free Exercise Clause of the First Amendment.

In *Sherbert*, *Thomas* and *Hobbie*, this Court considered First Amendment rights of individual unemployment benefit claimants in a factual setting where the religious significance of the beliefs under scrutiny was uncontested.

At the administrative hearing in the case *sub judice*, Mr. Frazee explained his refusal to work on Sunday in terse statements factually insufficient to establish any religious significance. These statements were found to express personal preference.

On judicial review, the Illinois Appellate Court, bound by the administrative record, the "manifest weight" standard of review and the lack of factual evidence to support a claim of religious belief, affirmed the denial of benefits.

While courts and administrative agencies may not pass on the truth of a claimed religious belief, an individual seeking First Amendment protection must articulate the basis of his belief so that a factual determination can be made as to whether it is religious or merely personal.

The Department contends that in order to establish a factual predicate for Free Exercise protection, any claim to religious beliefs must meet a simple three prong test:

1) The belief must be stated in terms sufficiently particular to be understood by objective standards;
2) The belief must be directly relevant to the purpose for which it was invoked; and
3) The belief must be based on religion as opposed to personal preference.

It is the Department's position that Mr. Frazee failed to meet this modest test and that the factual determination that his beliefs were not religious but merely personal was correct.

Personal and philosophical beliefs do not enjoy the same constitutional protection as religious beliefs, therefore, facts sufficient to distinguish one from the other must be presented by the claimant. This Mr. Frazee failed to do.

ARGUMENT

I.

THE STATE OF ILLINOIS DID NOT VIOLATE THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT BY DENYING MR. FRAZEE UNEMPLOYMENT BENEFITS.

Initially, it must be recognized that the Illinois Department of Employment Security [hereinafter "Department"] does not disagree with, or challenge, the well-established status of the law set forth by this Court's decisions in

Sherbert v. Verner, 374 U.S. 398 (1963); *Thomas v. Review Board*, 450 U.S. 707 (1981); and *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987). In each of those cases the claimant's beliefs were indisputably "religious," whereas Mr. Frazee's beliefs were found to be "personal." Mr. Frazee's brief mischaracterizes the Department's position and the opinion below as applying a "new test" for religious beliefs. (Appellant's Brief p. 6). Such is not the case. It is the Department's position that requiring a claimant to prove that his beliefs are "religious," and more than personal preference, does not represent a departure from this Court's triad of unemployment benefit decisions. In the instant case, Mr. Frazee failed to prove that his beliefs were more than mere personal preference. Therefore, he is not entitled to First Amendment protection.

A. Mr. Frazee Failed To Demonstrate The Religious Basis For His Refusal Of Sunday Work.

Under Illinois law the receipt of unemployment insurance benefits is a conditional right, and a claimant bears the burden of establishing eligibility before the agency. *Popoff v. Department of Labor*, 144 Ill. App. 3d 575, 494 N.E.2d 1266 (1986). The primary purpose of the Illinois Unemployment Insurance Act [hereinafter the "Act"] is to provide compensation benefits to individuals in order to alleviate economic distress caused by involuntary unemployment. *Wadlington v. Mindes*, 45 Ill. 2d 447, 259 N.E.2d 257 (1970), *appeal dismissed*, 400 U.S. 935 (1970).

To qualify for benefits, a claimant must satisfy the terms and conditions of the Act. *Clark v. Board of Review*, 126 Ill. App. 3d 559, 561, 467 N.E.2d 950 (1984). Section 500 of the Act requires the recipient of unemployment benefits to make ongoing efforts to return to the workforce and remain ready to appear and apply for those job opportunities to which the Department directs him. Ill. Rev. Stat. ch. 48, ¶ 420 (1987). In addition, the Act provides for termination of benefits for failure to accept work without good cause. Ill. Rev. Stat. ch. 48, ¶ 433 (1987). A claimant has both the responsibility to remain available for suitable job opportunities and the burden to prove any claim of unavailability or unsuitability. This burden remains with the claimant and never shifts to the State. *Yadro v. Bowling*, 91 Ill. App. 3d 889, 414 N.E.2d 1244 (1980). Here, Mr. Frazee failed to meet his burden.

At the administrative hearing, Mr. Frazee stated the reason for his refusal to work was that he was a Christian and he elaborated only that it was "against [his] faith to work on Sunday." (Jt. App. 5). Mr. Frazee conditioned this proclamation of "faith" by acknowledging that he might accept work on Sunday if "it was an essential service job such as where life is at stake." (Jt. App. 6). Therefore, by Mr. Frazee's own admission, he would work on Sunday as a lifeguard at the beach but not as a beach vendor; as a fire fighter but not as a fire investigator; or in a hospital emergency room but not in the hospital's file room. Additionally, he qualified his availability for Sunday work on whether or not "profit is involved." (Jt. App. 6). Clearly, this subjective qualified "faith" regarding Sunday work fails to establish Mr. Frazee's claim that his refusal to work was for good cause.

The Hearing Referee's inquiry about "what church do you belong to" and "is that one of your tenets" should not be read as requiring that an individual's religious belief be a tenet of an established religious organization. Those questions, when read in context, demonstrate the referee's attempt to elicit an explanation beyond the eight

words used to justify the religious basis for his refusal to work on Sunday.[5]

The Department responsible for the efficient, effective and fraud-free implementation of the unemployment insurance program is justified in denying benefits to one whose refusal to work is recited in simplistic terms unaccompanied by any explanation other than "yes" to some Sunday jobs and "no" to other Sunday jobs. It is not the Department's burden to "make a record" for a claimant which will bring legitimacy to an inadequate claim of religious convictions.[6] Mr. Frazee could have met this minimal burden by merely elaborating on his beliefs and whether he adhered to those beliefs. Instead, Mr. Frazee provided only terse statements offering no insight as to his beliefs, despite the fact that he was given the opportunity to do so.[7] Mr. Frazee cannot escape this minimal burden by foisting a non-existent duty on the Department to ask him the "right questions."

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[5] Q. Why can't you work on Sunday?
A. It's just against my faith.
Q. What faith is that?
A. I'm a Christian.

[6] The brief of *Amici Curiae*, American Jewish Congress, et al., purports to fault Illinois for the weakness of Frazee's evidence as to "beliefs" (see page 45 and footnote 31) by arguing that "the questions asked do not elicit constitutionally relevant responses" and that he "was never asked" various other questions. This argument is an attempt to shift the burden to the finder of fact. It is the claimant's burden to prove eligibility for benefits.

[7] The hearing referee specifically invited Mr. Frazee to add anything he wanted to say into the record:
Q. Anything else you wish to add?
A. I can't see—say anything. (Jt. App. 11).

An individual's burden extends beyond the recitation of magic words. He may not be found to have met his burden by simply proclaiming "I'm a Christian" or saying "it's against my faith." Inasmuch as "courts should not undertake to dissect religious beliefs. . . ," *Thomas*, 450 U.S. at 715, the burden rests squarely on an individual to make a record regarding his "beliefs" from which the fact finder can arrive at a conclusion regarding their religious significance. It is true that religious beliefs may be based on individual reflection and study rather than institutionalized dogma,[8] but this reality serves only to intensify the imperative of a record which articulates beliefs of a religious nature.

Nowhere in the record does Mr. Frazee speak of "beliefs" or "religion;" nor does he relate his prior Sunday employment practices; or flesh out his bare bones proclamation that "I'm a Christian." Hence, he fails to establish any religious significance for his work refusal. Claims adjudicators, hearing referees and boards of review cannot be expected to "read between the lines" so as to find, and then ascribe, religious beliefs to claimants seeking benefits. In the absence of *any* evidence of his beliefs, no court may impose phantom beliefs, label them religious and cloak them with constitutional protections as Mr. Frazee would have this Court do.[9] Administrative tribunals

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[8] *See, e.g., Stevens v. Berger*, 428 F. Supp. 896, 902 (E.D.N.Y. 1977) (individuals encouraged to study the Bible and develop personal understanding of its teachings).

[9] The ease with which beliefs may be gratuitously, but wrongly, imposed is made manifest by *Amici* whose brief acknowledges that the instant record is devoid of any claim to Protestantism by Mr. Frazee (*Amici* Brief American Jewish Congress, et al., p. 45 n.31) but, nonetheless, boldly proclaims that "Frazee is a Protestant". *Id.* at p. 6.

are repeatedly admonished to confine their findings to the evidence presented and not to expand those findings based on the personal expertise of the hearing officers or their independently secured knowledge. *Ohio Bell Telephone Co. v. Public Utilities Co.*, 301 U.S. 292 (1937); *Cook County Federal Savings & Loan Assoc. v. Griffin*, 73 Ill. App. 3d 210, 391 N.E.2d 473 (1979). Standing alone, Mr. Frazee's proclamation of "faith" does not rise to the level of a "religious belief" and, as the hearing referee and the Board of Review found, does not constitute good cause for his work refusal. Here, the Board of Review found Mr. Frazee's work refusal to be based on "personal desires" and his invocation of "faith" to be inferentially pretextual. Mr. Frazee, "does not dispute the factual findings of the Board of Review." (Appellant's Brief Opposing Motion of State Appellees to Dismiss or Affirm p. 2).

A religious basis for a Sunday sabbatarian may be stated in numerous ways, with "tenets and dogma of an established religious sect" the most recognizable. However, long standing practice, moral persuasion, dictates of conscience, firmly held beliefs, product of individual study, revelation, personal judgment, harmonious social order, gradual evolution, fear of God, Biblical analysis, way of life, upbringing or any other such individualized expression of a religious imperative would also suffice. However characterized, a religious basis must be sufficient to impart both knowledge and confidence that religion and not personal preference is being expressed. Mr. Frazee presented no such proof and the hearing referee may not "find" that which was never presented. *Flick v. Gately*, 328 Ill. App. 81, 65 N.E.2d 137 (1946). *See also Metropolitan Sanitary Dist. v. Pollution Control Board*, 62 Ill. 2d 38, 338 N.E.2d 392 (1975).

No reading of the sequence of events in this case permits the conclusion that the Department was passing on the

religious significance of Mr. Frazee's beliefs or deciding that true Sunday sabbatarians are without rights guaranteed by the Free Exercise Clause of the First Amendment. This case does not draw a distinction "between individual non-conforming religious beliefs and the tenets of an established religious organization." (Appellant's Brief p. 15). This case stands only for the proposition that Mr. Frazee failed in his burden to articulate anything which approximates a good faith application of religious convictions.

It is not an unconstitutional restraint on religious freedom to impose the burden of proving the religious significance of one's beliefs. Here, Mr. Frazee submitted what was clearly a personal preference cloaked in a claim of religious convictions. In addition, the record is devoid of any evidence regarding the source or extent of his asserted belief. The totality of Mr. Frazee's evidence, laced with conclusory statements recited in litany form,[10] was found to express "his personal desires." (Jt. App. 18). Only sincere religious beliefs and not sincere personal desires are constitutionally protected. Until the simple proclamation "I am a Christian," or its equivalent, is deemed sufficient to articulate a sincere religious belief, the need to explore religious practices, beliefs, dogma and tenets will continue.

The fact that a prohibition against Sunday work was, at one time, deeply rooted in Christianity, *McGowan v. Maryland*, 366 U.S. 420, 431-33 (1961), does not relieve Mr. Frazee of his obligation to highlight the line between a personal preference not to work on Sunday, and a religious belief prohibiting Sunday work. No rational assumption regarding the notoriety of the Christian sabbath can be found to substitute for evidence of the claimant's

[10] "As a Christian I can't do that"; "It's just against my faith"; "I'm a Christian"; "Just as a Christian, I feel it's wrong". (Jt. App. 5-6).

adherence to those beliefs. To extend the doctrine of judicial notice so as to define Mr. Frazee's Christianity would be to turn the doctrine into a pretext for dispensing with any hearing whatsoever.

B. Mr. Frazee's Argument Ignores The Limited Scope Of The Illinois Appellate Court's Holding.

Mr. Frazee's argument ignores the limited scope of the Illinois Appellate Court's finding and, instead, directs this Court's attention to language that is clearly dicta. Mr. Frazee is incorrect when he says "in the instant case, the Appellate Court of Illinois applied a new test to determine whether a belief is a constitutionally cognizable religious belief." (Appellant's Brief p. 6).

All of the judicial proceedings herein were pursuant to Mr. Frazee's "Complaint for Administrative Review." (Jt. App. 20). Under Illinois law, judicial review of administrative decisions is strictly limited. The findings and conclusions of the administrative agency on questions of fact are to be considered *prima facie* true and correct. Ill. Rev. Stat. ch. 110, ¶ 3-110 (1987). This statute has consistently been construed to mean that courts may not interfere with administrative fact finding unless the decision is against the manifest weight of the evidence.[11] Ill. Rev.

[11] Similarly, under FED.R.CIV.P. 52(a), questions of fact are reviewed under the deferential, clearly erroneous standard, *United States v. McCooney*, 728 F.2d 1195 (9th Cir.), *cert. denied, sub nom. McConney v. United States*, 469 U.S. 824 (1984). Mr. Frazee's beliefs have been found to be "personal" and therefore "non-religious." The definition of words, either common or technical, involve questions of fact and "we are bound by the court's [finder of fact] findings as to the definitions if they are supported by substantial evidence." *Order of Railway Conductors v. Swan*, 152 F.2d 325, 327 (7th Cir. 1945).

(Footnote continued on following page)

Stat. ch. 110, ¶ 3-110 (1987). Illinois courts will only reverse an administrative decision found to be "arbitrary and capricious," *Murdy v. Edgar*, 103 Ill. 2d 384, 391, 469 N.E.2d 1085 (1984), and "obviously and clearly wrong," *Board of Education v. County Board*, 32 Ill. App. 2d 1, 6, 176 N.E. 2d 633 (1961). So great is the deference that Illinois courts accord to administrative decisions that "the opposite conclusion must be clearly evident" before a reversal is authorized. *Carrao v. Board of Education of Chicago*, 46 Ill. App. 3d 33, 40, 360 N.E.2d 536 (1977). The test generally applied is one requiring a finding "that no rational trier of fact could have agreed with the [agency's] decision." *Agans v. Edgar*, 142 Ill. App. 3d 1087, 1094, 492 N.E.2d 929 (1986). Such a test is patterned after that announced by this Court in *Jackson v. Virginia*, 443 U.S. 307, *reh'g den.* 444 U.S. 890 (1979). *See also Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 291 (1960).

Applying these standards to Mr. Frazee's Complaint for Administrative Review, the Circuit Court of Peoria County affirmed the decision of the Department, which concluded "that the claimant refused an offer of suitable work without good cause, and, therefore was subject to a disqualification of benefits." (Jt. App. 19). It was Mr. Frazee's factually inadequate presentation and the evidentiary insufficiency of that presentation which led the Appellate Court to the gratuitous non-binding discussion of "tenets or dogma of an established religious sect."

[11] *continued*

Had Mr. Frazee's beliefs been found to be "religious" as opposed to "personal" such a conclusion would not be supported by substantial evidence since Mr. Frazee failed to offer any facts or evidence from which his Sunday work refusal might be found to be religious.

Mr. Frazee takes issue with the Appellate Court's opinion wherein the court:

> delv[ed] into the history of the significance of Sunday as to the activities permitted in order to illustrate that from a day designated as a holy day it has evolved into a day of also permitting rest, recreation, business, industry and labor.

Frazee v. Department of Employment Security, 159 Ill. App. 3d 474, 478, 512 N.E.2d 789 (1987). Throughout his brief, Mr. Frazee argues with these statements. Such an argument is interesting but unavailing because the only issue before the Court was whether the final administrative decision was against the manifest weight of the evidence.

The Illinois Appellate Court took note of the "I am a Christian" declaration by Mr. Frazee and drew an analogy to *Sherbert*, *Thomas*, and *Hobbie*. It found a "common thread" that "each . . . claimant was a member of an established religious sect or church . . . exercising what was believed to be a tenet, belief or teaching of an established religious body." *Frazee*, 159 Ill. App. 3d at 477.

There is no denying the existence of a "common thread," but the difficulty with the comparison sought to be made is that the Appellate Court was dealing, in the instant case, with a factual finding of "personal" beliefs while attempting to draw a comparison with three cases where the "religious" significance of the claimant's belief was never disputed. (*See Sherbert*, 374 U.S. at 399 n.1; *Thomas*, 450 U.S. at 712 n.6 and *Hobbie*, 480 U.S. at 138 n.2).

It is Mr. Frazee, and not the Department, who seeks to take this Court beyond the bounds of *Sherbert*, *Thomas* and *Hobbie*. In each of those cases the "religious" significance of the claimants' belief was uncontested whereas here the "faith" of Mr. Frazee was factually determined to be "personal" and non-religious. In addition, the religious implications discussed by the Court in those cases do not go beyond the particular issue to be decided as Mr. Frazee would have the Court do in the case *sub judice*.

The singular issue before the Appellate Court, on review of the Circuit Court's affirmance, was whether the decision of the Department was "obviously and clearly wrong" so that an "opposite conclusion was clearly evident." The Appellate Court's affirmance stands for the simple proposition that, on the basis of this record, all rational finders of fact would agree that the finding of "personal" rather than "religious" beliefs was not obviously and clearly wrong.

In the instant case, the Illinois Appellate Court did not create "a new test" as Mr. Frazee claims. Instead, it merely applied an old test and determined that the decision of the administrative agency was not "contrary to the manifest weight of the evidence." The so-called "new test" is non-binding dicta.[12]

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[12] Dictum is an observation that appears in the opinion of the court but is unnecessary to the disposition of the case before it. *Burroughs v. Holiday Inn*, 621 F. Supp. 351 (W.D.N.Y. 1985) *citing*, 1B *Moore's Federal Practice*, ¶ 0.401[2] (2d Edition, 1984). Moreover, they are observations which could have been deleted without seriously impairing the analytical foundations of the holding. *Sarnoff v. American Home Products Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986). Justice Holmes provides insight when he dispatches with dictum by stating it "is not worthwhile to spend much time upon it." *Fauntleroy v. Lum*, 210 U.S. 23 (1907).

II.

REFERENCE TO THE BASIS OF A SUBJECTIVE BELIEF IS REQUIRED IN ORDER TO DETERMINE IF MR. FRAZEE'S BELIEFS ARE RELIGIOUS.

In a number of analogous situations, this and other courts have been called upon to determine whether certain beliefs come within the definition of religion and, therefore are entitled to First Amendment protection. In each instance, the court examined the claimed belief and formulated ways to distinguish religious beliefs from non-religious beliefs or personal preferences. Mr. Frazee's claim of religious protection must be examined to determine its sufficiency, relevancy and sincerity in light of the Free Exercise Clause.

A. Federal Case Law Requires Factual Evidence To Establish The Existence Of Religious Beliefs.

The Free Exercise Clause requires, as a prerequisite to First Amendment protection, factual evidence to establish the existence of religious beliefs. The Constitution provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. Amend. I. Congress cannot know and the courts cannot measure a statute's impact on religion unless the salient points of the religion are objectively measurable. The need to identify some tangible evidence of a religion and its beliefs leads both courts and legislative bodies into invoking "dogma and tenets" as a shorthand way to measure the breadth and scope of religious beliefs.

The ethereal nature of beliefs, faith, conscience, convictions, trust and reliance, and the motivating force behind other inner restraints, have always been discussed in terms of dogma, precepts, canons, rules, articles, maxims, creeds and tenets. This analysis is necessary in order to

give substance and understanding to that which may otherwise seem vague, tenuous or difficult to comprehend. While speaking in terms of "dogma and tenets," courts have always looked to new avenues in seeking to understand the significance of beliefs claimed to be religious. This Court has, on numerous occasions, distinguished between those beliefs deemed religious, and thereby entitled to constitutional protection, and those found not to be entitled to such protection. In every case, it is the facts that distinguish the beliefs as religious. Religion has no special place in our reservoir of understanding which permits its definition to be circumscribed without facts.

In *United States v. Seeger*, 380 U.S. 163 (1965), the Court considered the statutory exemption, 50 U.S.C. § 456(j), from military service granted to conscientious objectors. The statute defined religious beliefs in relation to a "supreme being" which exacted duties superior to any arising out of human relationships. 50 U.S.C. § 456(j). Mr. Seeger presented extensive and specific evidence demonstrating his individual and personal convictions and beliefs. Despite the fact that his claims were not based upon a "belief in relation to a supreme being," this Court held that ". . . the beliefs which prompted his objections . . ." were sufficient to justify objector status. *Id.* at 187. *See also Welsh v. United States*, 398 U.S. 333 (1970).

The decision to grant Mr. Seeger conscientious objector status was based on specific evidence which made it possible to ascertain his beliefs and the impact of those beliefs upon his life. If the only evidence of Mr. Seeger's beliefs was the statement "I'm a conscientious objector," it is unlikely that this Court would have granted him statutory protection.

In contrast to *Seeger*, this Court in *Gillette v. United States*, 401 U.S. 437 (1971), also scrutinized the beliefs of a claimed conscientious objector, but held that Mr. Gillette's beliefs did not entitle him to objector status. Despite the obvious risk of seemingly inconsistent and erratic decision-making, this Court looked beyond superficial and self-serving labels, analyzed the substance of the individual's beliefs, and refused to honor beliefs of indeterminate scope. *Id.* at 458. Mr. Gillette, like Mr. Frazee, failed to factually establish the religious significance of his professed beliefs.

Similar to the Universal Training and Service Act, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j), exemplifies the statutory inability to comprehensively define bona fide religious beliefs. Title VII prohibits religious discrimination and generally leaves to triers of fact the determination of whether or not a particular activity constitutes the exercise of religion. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Expanding on the *Wisconsin v. Yoder* theme that only beliefs that are religious, and not those that are philosophical or personal, are protected by the Free Exercise Clause, *id.* at 216, a Court of Appeals has formulated the following test:

> Whether a belief is "religious" and thus deserving of some protection . . . does not depend on whether the belief is true or false. Nor does it depend on whether the belief is reprehensible to the majority of society. Instead . . . the "religious" nature of the belief depends on (1) whether the belief is based on a theory of "man's nature or his place in the universe," (2) which is not merely a personal preference but has an institutional quality about it, and (3) which is sincere.

Brown v. Dade Christian Schools, 566 F.2d 310, 324 (5th Cir. 1977). This test must be applied to "*all* forms and all aspects of religion, however eccentric." *Cooper v. Gen. Dynamics, Convair Aerospace Div.*, 533 F.2d 163 (5th Cir. 1976), *cert. denied, International Association of Machinist & Aerospace Workers v. Hopkins*, 433 U.S. 908 (1977).

In *Redmond v. GAF Corporation*, 574 F.2d 897 (7th Cir. 1978), the Court reviewed the plaintiff's evidence to determine if a *prima facie* case of religious discrimination was presented. The record in *Redmond* set forth the plaintiff's religious beliefs, including the fact that he had been an active, participating member of the church for over 16 years, was appointed as a lifetime leader of Bible study class, did missionary field work, and felt that participation in church activities was at the dictate of the church elders and was a religious obligation. The Court found that the plaintiff had established that his religious practice and beliefs prevented him from working on Saturday and, in so doing, had established a *prima facie* case of religious discrimination.

While the constitutional guarantees implicated in the instant case differ from the statutory requirements in the conscientious objector and Title VII cases, the unmistakable common denominator is that when individual beliefs are scrutinized for religious significances "each case involving such a determination necessarily depends upon its own facts and circumstances . . . ." *Redmond*, 574 F.2d at 902-03. In the absence of affirmative and convincing evidence "he [Mr. Frazee] may forego the right to have his beliefs accommodated." *Chrysler Corporation v. Mann*, 561 F.2d 1281, 1286 (8th Cir. 1977).

When Mr. Frazee declined gainful employment declaring only "I'm a Christian," he invited legitimate analysis

that cannot be accomplished in the absence of proof regarding his beliefs. "Religion is an individual experience," *Wisconsin v. Yoder*, 406 U.S. at 243, recognition of which is dependent on proofs as to its "sincerity", its "religious" significance, and its relevant "beliefs." Frazee's brief acknowledges that "the threshold question" is whether he has expressed "a constitutionally cognizable religious belief." (Appellant's Brief p. 22). No cognizable religious belief can be found in a constraint on Sunday work which varies depending on whether the employee performs an "essential service" and whether the employer derives a "profit." No case has ever given constitutional protection in the absence of factual proof.

B. Sincerely Held Religious Beliefs Must Be Articulated In Clear And Definite Terms.

Courts have employed definite criteria to be considered in determining the existence of a "religious belief". These criteria have evolved in the course of reviewing various types of Free Exercise questions. Applying these criteria here demonstrates that the Department was presented with a personal preference rather than a religious belief.

A personal preference for not working on Sunday does not implicate the First Amendment. Mr. Frazee failed to sufficiently articulate his objection to Sunday work in terms rooted in either religious belief or established personal conviction that compels conscience and dictates action, as required under the Free Exercise Clause.

The Free Exercise Clause is applicable when the proponent of sincerely held beliefs satisfies three modest conditions:

1) The belief must be stated in terms sufficiently particular to be understood by objective standards, *Dettmer v. Landon*, 799 F.2d 929 (4th Cir. 1986);

2) The belief must be directly relevant to the purpose for which it is invoked, *Thomas v. Review Board*, 450 U.S. 707 (1981); and

3) The belief must be based on religion or an established personal conviction which, in lieu of religion, compels conscience and dictates action, *United States v. Seeger*, 380 U.S. 163 (1965), *Welsh v. United States*, 398 U.S. 333 (1970).

The first condition, that the belief be stated in terms sufficiently explicit and definite so as to be objectively understood as religious, is necessitated by the reality of the religious pluralism of the American people. According to the Census Bureau, there are more than 1,000 different religious denominations in this country.[13] Decision makers, hearing officers, quasi-judicial boards, judges and other fact finders cannot reasonably be aware of the existence or intricacies of all beliefs which fall within the scope of First Amendment Free Exercise protection.

Something more than familiarity with the generic name of the religion is required in order to appreciate the scope of its teachings, the nuances of its practices, and the application being made by the proponent. For example, the sterile proclamation that "I am a Wiccan," *Dettmer v. Landon*, 799 F.2d 929 (4th Cir. 1986), *cert. denied*, *Dettmer v. Murray*, ___ U.S. ___ (1987), does not impart that level of objective information from which a fact finder could reasonably determine the legitimate application of Free Exercise principles. In recognition of this reality, *Dettmer* presented extensive factual data in order to allow

[13] *See* U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States at 51-53 (105*th* ed. 1985).

the court to understand witchcraft and appreciate its significance in the lives of its adherents. Armed with this understanding, the court confidently declared that "its doctrine must be considered a religion." *Id.* at 932. Being told "it is my faith" or "it is my belief" similarly falls short of the objective criterion which can be recognized as being religious or paralleling religion within the scope of the First Amendment.

Regardless of whether the beliefs are conventional or eccentric, widespread or unique, the burden to articulate them in understandable terms is the same. Subjective evaluation by the fact finder is thus eliminated, as in any assumption or inference as to the nature of the beliefs. Review is facilitated by what has actually been professed by the claimant without the questionable and unwarranted embellishment derived from common knowledge or judicial notice.

The second condition, relevancy, addresses the obvious, and necessary, requirement that the expressed religious belief must have a direct impact on the status sought to be changed. Sincerely held religious beliefs as to work on Sunday, *Sherbert v. Verner*, 347 U.S. 398 (1963), or as to compulsory secondary education of children, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), are irrelevant and unavailing when presented as justification for those seeking relief from "participation in the production of armaments." *Thomas v. Review Board*, 450 U.S. 707 (1981). In *Thomas*, this Court recognized that differing beliefs and practices are not uncommon among followers of a particular creed. *Id.* at 715. It is precisely because some followers of a particular creed may be sabbatarians and others of the same creed may be pacifists and still others may be both or neither, that the relevancy of beliefs to burdens must be set out with particularity by the proponent. The variety

of practices and beliefs, even within the same religious denomination, imparts an obligation on the proponent of Free Exercise protections to pinpoint his belief and practice as it relates to the perceived burden.

The third condition, that the belief be based on religion or on those forces in the proponent's life which occupy a place "parallel to that filled (in others) by the orthodox belief in God," *United States v. Seeger*, 380 U.S. 163, 166 (1965), assures comparable Free Exercise protection to both mainstream religions and those whose beliefs are not "acceptable, logical, consistent or comprehensible to others." *Thomas*, 450 U.S. at 714. It is through this third condition that "we sponsor an attitude . . . that shows no partiality to any one group. . . ." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Neither partiality nor hostility is exhibited by an even-handed insistence upon affirmative showings that the belief invoked is indeed religious. An affirmative showing of religious belief is accommodated by evidence of any indicia which explain "the individual's own scheme of things religious." *Seeger*, 380 U.S. at 185. These, may include teachings, doctrine, study, history, practice, dogma, experience, tenets, perceived commands, motivated moral behavior, the imperatives of conscience and other forces that compel an individual's conduct. Without an affirmative showing of beliefs relevant to burdens, conduct such as wearing a hat indoors, *Goldman v. Weinberger*, 475 U.S. 503 (1986), or drawing a circle of sea salt or sulfur on the floor, *Dettmer v. Landon*, 799 F.2d 929 (4th Cir. 1986), would not likely command respect as being religiously significant. Absent the proponent's evidentiary explanation, no other shortcut to the conclusion of religious significance is permissible.

Rights under the Free Exercise Clause are not diminished, and those citizens invoking the protection thereof are not burdened, by a recognition that constitutional rights must be asserted in terms and contexts consistent with their established purposes. The three prong test set forth above, is an acknowledgement that important constitutional protections are not self-executing and that a modest burden must be met by those who seek to invoke them.[14] Within the standards of *Seeger*, testing for "sincere religious beliefs", in the absence of a factually complete record, requires the fact finder to infer facts, assume beliefs, and apply his own subjective understanding of the term "Christian." Such a result is to be avoided because it can operate to deprive First Amendment protection to those entitled to it and wrongly bestow First Amendment protection upon those who do not qualify for it.

[14] An additional benefit from a three prong test which focuses on the particularity and relevancy of the claim is that the "struggle to find a neutral course between the two Religion Clauses," *Walz v. Tax Commission*, 397 U.S. 664, 668-69 (1970), will be facilitated by a record which leaves no room for inferences, construction or judicial activism. This Court has noted the "tension" between the two religion clauses in both *Thomas*, 450 U.S. 707, 719, and *Sherbert*, 374 U.S. 398, 413-17.

CONCLUSION

WHEREFORE, the State Appellees respectfully request this Court to affirm the judgment of the Illinois Appellate Court which upheld the Department's determination that Mr. Frazee refused an offer of suitable work without good cause, and therefore was subject to a disqualification of benefits under the Illinois Unemployment Insurance Act.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROBERT J. RUIZ *
Solicitor General, State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3813

Attorneys for State Appellees

DIANE CURRY GRAPSAS
MARCY I. SINGER
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2566

Of Counsel

* Counsel of Record

REPLY

BRIEF

No. 87-1945

IN THE

Supreme Court Of The United States

October Term, 1987

WILLIAM A. FRAZEE,

Appellant,

v.

DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD, Director of the Illinois Department of Employment Security; and BRUCE W. BARNES, Chairman, Board of Review; and KELLY SERVICES,

Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS FOR THE THIRD DISTRICT

REPLY BRIEF

David A. French
Counsel of Record
F. Tayton Dencer
THE RUTHERFORD INSTITUTE
P.O. Box 510
9411 Battle Street
Manassas, VA 22110
(703) 369-0100
Counsel for Appellant

Balmar Legal Publishing Division, Washington, D.C. (202) 682-9800

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REPLY BRIEF

I. INTRODUCTION

Defendants Department of Employment Security, Sally Ward, and Bruce W. Barnes (hereinafter "State Defendants" or "Defendants") have consistently argued, both in the administrative and lower court proceedings, that Plaintiff William A. Frazee's religious beliefs were not entitled to constitutional protection for the sole reason that such beliefs were not "found in the tenets of an established religious organization." The Appellate Court of Il-

linois accepted this novel view of the scope of the free exercise clause, and upheld Defendants' denial of Mr. Frazee's application for unemployment benefits.

For unexplicated reasons, the State Defendants have apparently abandoned this novel view in the proceedings before this Court (terming the holding of the Illinois appellate court "dictum"), and now urge that Mr. Frazee's request for benefits was properly denied because he allegedly failed to meet the "burden of proof necessary to establish the religious significance of his beliefs." Defendants further attempt to mischaracterize the conclusion that Mr. Frazee's religious beliefs were not entitled to First Amendment protection as a "factual determination" not subject to reversal unless "no rational trier of fact" could have made such determination.

These contentions are devoid of support in the record and incorrect as a matter of law. A brief rebuttal of Defendants' new claims is in order.

II. THE BOARD OF REVIEW OF THE ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY AND THE APPELLATE COURT OF ILLINOIS DENIED MR. FRAZEE'S CLAIM BECAUSE OF AN ERRONEOUS CONCLUSION CONCERNING THE SCOPE OF THE FREE EXERCISE CLAUSE, NOT BECAUSE MR. FRAZEE FAILED TO PRESENT SUFFICIENT EVIDENCE OF HIS RELIGIOUS BELIEFS.

Although the Defendants now argue that the Board of Review of the Illinois Department of Employment Security and the Appellate Court of Illinois rejected Mr. Frazee's claims because he failed to present sufficient evidence to demonstrate the "religious significance" of his beliefs, the fact is that the Board of Review and the Illinois appellate court never questioned the religious nature of Mr. Frazee's beliefs. It is of course uncontroverted that Mr. Frazee asserted a religious ground for his

refusal to accept Sunday work (Jt. App. 5-6). Further, Mr. Frazee's sincerity in his belief that his religion forbade non-essential Sunday labor has been accepted during the entire course of the proceedings below. Defendants' contrary assertion at page 14 of their brief that the Board of Review found Mr. Frazee's "invocation of 'faith' to be inferentially pretextual" is simply false, and Plaintiff can only conclude by such assertion that Defendants are attempting to affirmatively mislead the Court.

The Board of Review did *not* deny Mr. Frazee's claims based on a finding of insincerity, but declined to accept Mr. Frazee's beliefs "*no matter how strong or sincerely held*" (emphasis added) because such beliefs were not based upon the tenets or dogma of a church, sect, or denomination (Jt. App. 18). The Illinois appellate court likewise accepted the sincerity of Mr. Frazee's religious belief stating: "We do not question the sincerity of the Plaintiff." *Frazee v. Dept. of Employment Security*, 159 Ill. App. 3d 474, 477 (1987); 512 N.E. 789, 791; Jt. App. 29.

Both the Board of Review and the Illinois appellate court understood the religious nature of Mr. Frazee's beliefs, the Board referring to them as "religious convictions" (Jt. App. 18) and the Illinois appellate court terming his belief against Sunday labor "a personal professed *religious* belief." *Frazee*, 159 Ill. App. 3d at 475; 512 N.E.2d at 790; Jt. App. 27 (emphasis added). Thus, it was not a paucity of evidence concerning Mr. Frazee's religious beliefs that led the Board of Review and the Illinois appellate court to reject Plaintiff's claims.

The Board of Review could not have made the precise grounds for its rejection of Mr. Frazee's application for benefits any plainer than the language contained in its decision:

> When a refusal to work is based on religious convictions, the refusal must be based upon some tenets or dogma accepted by the individual of some church, sect, or denomination, and such a refusal based solely on an

> individual's personal belief is personal and noncompelling and does not render the work unsuitable.

(Jt. App. 18).

The Illinois appellate court affirmed the Board's decision (in accordance with the arguments propounded by Defendants) on the ground that a religious belief against Sunday labor, to receive constitutional protection, "must be found in a tenet or dogma of an established religious sect. The Plaintiff in this case does not profess to be a member of any such sect." *Frazee*, 159 Ill. App. 3d at 478; 512 N.E.2d at 792; Jt. App. 31.

Thus, the decisions of the Board of Review and the Illinois appellate court manifestly did not turn on a "factual determination" that Mr. Frazee's beliefs were "pretextual" or even on a determination that his beliefs were insufficiently expounded. Rather, such decisions were based on the conclusion that the free exercise clause extends protection to an applicant only when he or she is a member of an established religious organization and when his or her beliefs are found in the tenets or dogma of the organization. As Plaintiff demonstrated in his original brief, this conclusion is at variance with the settled doctrine of *Sherbert v. Verner*, 374 U.S. 398 (1963), *Thomas v. Review Board*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987) and other established First Amendment principles, and as such is incorrect as a matter of law.

Although Defendants argue that the Board of Review in the Illinois appellate court "factually determined [Mr. Frazee's beliefs] to be personal," the issue addressed by both the Board of Review and the Illinois appellate court was whether Mr. Frazee's beliefs merited protection as religious beliefs under the free exercise clause. A determination of the significance or sufficiency of a sincere belief for constitutional purposes involves questions of law. These questions of law are readily amenable to resolution by an appellate court, and this Court therefore need not be detained

by Defendants' remonstrance concerning the limited scope for judicial review of administrative findings of fact.

III. MR. FRAZEE'S BELIEF AGAINST SUNDAY LABOR IS CLEARLY ROOTED IN RELIGION AND ENTITLED TO THE PROTECTION OF THE FIRST AMENDMENT.

Defendants, having abandoned the test adopted by the Illinois appellate court, now proffer another test by which to measure Mr. Frazee's religious beliefs. Among other requirements, Defendants aver that religious beliefs "must be articulated in clear and definite terms" in order to receive constitutional protection.

The Court has made eminently clear, however, that a belief must only be identifiable as religious, as contradistinguished from a purely secular or philosophical belief, to be eligible for the protection of the First Amendment. *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972). Moreover, contrary to Defendants' claim, a person seeking constitutional protection need not articulate his or her religious beliefs in clear and definite terms. As this Court emphasized in *Thomas v. Review Board*, 450 U.S. 707, 715 (1981):

> Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position *or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ*.

(emphasis added).

And, rather than admonishing courts to engage in an extensive inquiry to ascertain a "clear and definite" basis for a claimant's religious beliefs, this Court has strictly circumscribed the scope of courts' inquiries into religious beliefs. "The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work be-

cause of an honest conviction that such work was forbidden by his religion." *Id.* 715-16. Once the claimant's sincerity is established, the asserted religious belief is eligible for constitutional protection so long as it is not "so bizarre, [and] clearly non-religious in motivation." *Id.* at 715.

Mr. Frazee's belief against participating in non-essential Sunday work more than satisfies these criteria. Neither the Board of Review nor the Illinois court questioned the sincerity of Mr. Frazee's beliefs. And, the religious nature of Mr. Frazee's beliefs is corroborated by the long history, detailed in Plaintiff's earlier brief, of the "Christian Sabbath." [1] Indeed, this history is so firmly established that no educated person could fail to grasp the religious nature of a sincere belief, based on Christianity, against Sunday labor.

The undeniably religious origin and tradition of the "Christian Sabbath," coupled with Mr. Frazee's unquestioned sincerity in asserting his religious belief against Sunday labor, clearly demonstrates that he refused the offer of employment "because of an honest conviction that such work was forbidden by his religion." The state's decision to deny Mr. Frazee unemployment benefits therefore impermissibly burdened his religious beliefs, and violated his First Amendment right to freely exercise his religion.

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[1] Defendants' claim that Mr. Frazee's beliefs against Sunday labor are not constitutionally protected because such beliefs "vary" depending on whether the work is non-essential cannot be sustained. The mere fact that Mr. Frazee has a qualified belief against Sunday labor does not render his belief non-religious. "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas*, 450 U.S. 714.

Further, Mr. Frazee explained the religious ground for this qualification in the administrative proceedings. His willingness to perform essential Sunday labor was predicated on the biblical account of Christ's action of healing on the Sabbath (Common Law Record 27). "And Jesus answering spake unto the lawyers and Pharisees, saying, Is it lawful to heal on the sabbath day? And they held their peace. And He took *him*, and healed him, and let him go; and answered them, saying, Which of you shall have an ass or an ox fallen into a pit, and will not straightway pull him out on the sabbath day?" Luke 14:3-5 King James Bible.

IV. CONCLUSION

Defendants' effort to characterize the issue before the Court as one of fact misconstrues both the evidence and the decisions of the Board of Review of the Illinois Department of Employment Security and the Appellate Court of Illinois. The proper issue before the Court is whether an unemployment applicant's religious belief must be an established tenet of a religious organization in order to receive First Amendment protection. Such issue is a matter of law, not fact, and can be readily resolved by reference to settled principles of First Amendment religion clause jurisprudence.

Finally, Defendants' new assertions concerning the requirements for a constitutionally protected religious belief are unfounded. Under the applicable standards, Mr. Frazee's belief against non-essential Sunday work clearly merits protection under the free exercise clause as a religious belief.

The state's decision denying Mr. Frazee unemployment benefits impermissibly infringed his right to freely exercise his religion under the First Amendment and Appellant Frazee therefore respectfully requests that the Court grant him the relief specified in the conclusion of the Brief for Appellant.

Respectfully submitted,

David A. French
Counsel of Record
F. Tayton Dencer
THE RUTHERFORD INSTITUTE
9411 Battle Street
P.O. Box 510
Manassas, VA 22110
(703) 369-0100

Counsel for Appellant
THE RUTHERFORD INSTITUTE

AMICUS CURIAE

BRIEF

No. 87-1945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM A. FRAZEE,
Appellant,

v.

DEPARTMENT OF EMPLOYMENT SECURITY, *et al.*,
Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS FOR THE THIRD DISTRICT

BRIEF FOR ROBERT ROESSER AND THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE APPELLANT

BRUCE N. CAMERON
National Right to Work
Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Counsel of Record for Amici Curiae

November 16, 1988

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No. 87-1945

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This brief for Dr. Robert Roesser and the National Right to Work Legal Defense Foundation is filed with the written consent of all parties. It supports the position of the appellant that the decision of the Appellate Court of Illinois should be reversed.

INTEREST OF *AMICI CURIAE*

Dr. Robert Roesser was formerly a member of the teaching faculty of the University of Detroit. He was fired from that position because the University, in a collective bargaining agreement, agreed that all members of the faculty would be required to join or financially support

the National Education Association and its affiliates as a condition of employment.

Dr. Roesser is a member of the Catholic Church who faithfully follows church teachings. He could not, consistent with his religious beliefs, financially support this labor union because it directly promoted abortion rights.

This clash between Dr. Roesser's religious convictions and his employer's requirements forced him to choose between his conscience and his position with the University. He chose his conscience and was fired.

Section 19 of the National Labor Relations Act (NLRA) (29 U.S.C. § 169) allows employees who have religious objections to joining or supporting labor unions to pay their compulsory fees to a charity instead of the union. This statute is limited, however, to an "employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religious body or sect which has historically held conscientious objections to joining or financially supporting labor organizations . . . ."

When Dr. Roesser filed a charge with the National Labor Relations Board alleging that this statute proscribed his dismissal, the General Counsel of the Board rejected his charge in part on the basis that there was no evidence that Dr. Roesser was "prohibited from supporting or associating with the union by his particular church leaders." This failure arose not from a lack of evidence of the position of the Catholic Church on abortion, but rather the lack of evidence that the church historically taught that church members should not be members of labor unions which promote abortion rights.

Dr. Roesser's situation is not unique. The National Right to Work Legal Defense Foundation is a charitable,

legal aid organization formed to protect the right to work, freedoms of association, speech and religion, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. The Foundation extends legal assistance to many working men and women whose religious beliefs do not allow them to join or financially support labor unions. Some of these workers who have received assistance are members of churches whose teachings specifically support their beliefs against joining or financially supporting a union. Other religious objectors assisted by the Foundation are either not members of any specific church or are members of churches which do not have specific teachings proscribing union membership or the financial support of labor unions.

The Foundation is currently providing legal assistance to a number of employees who, like Dr. Roesser, have sincere religious convictions which do not allow them to support a labor union, but whose beliefs are not specifically supported by the teachings of their church.

Ten states have enacted one or more statutes which, like Section 19 of the NLRA, limit the accommodation of religious objections to union membership to employees who are members of specific churches. These statutes and Section 19 could be directly affected by the Court's decision in this case. Since this appeal does not specifically involve one of these many statutes, it is anticipated that neither of the parties to the appeal will discuss the possible impact of the Court's decision on this class of cases.

This brief is filed to bring to the Court's attention these statutes and their impact upon the religious free-

dom of employees whose religious beliefs are not specifically taught by an established church.

SUMMARY OF ARGUMENT

Most of the working men and women of this country are covered by state or federal statutes which protect only a narrow class of employees who have religious objections to joining or financially supporting a labor union. These statutes are worded in such a way that on their face they protect only those religious objectors who are members of churches which teach that church members should not be union members.

The intent of the framers of the Constitution, past precedents of this Court and the legislative history of the leading statute in this area all support the idea that religious belief is to be broadly protected. It is not appropriate to prefer corporate over personal religious belief or the doctrines of one church over another.

If this Court agrees that such preference is not appropriate, what is done as a remedy could have a substantial and adverse effect on employees whose religious beliefs bar them from supporting labor unions. Consideration of both the constitutional rights of these employees and the intent of the legislature to protect religious belief warrants a broadening of these statutes to protect all sincere religious objectors.

ARGUMENT

I. Statutory Discrimination Against Individual Religious Faith And Practice Is Widespread.

The decision below rests entirely upon the premise that private, personal religious belief is inferior to religious

belief dictated by the formal teachings of an organized church. While the Board of Review and the court below arrived at this conclusion without any statutory direction, statutes which create such a distinction are widespread. The existence of these statutes, which cover the vast majority of the working men and women in this country, gives this case an importance far beyond its discrete facts.

Twenty-nine states have not enacted Right to Work laws, and thus employers and unions in those states are authorized to require employees to either join or financially support a labor union as a condition of employment. However, in these 29 states Section 19 of the NLRA (29 U.S.C. § 169) creates a limitation to protect the religious beliefs of working men and women. This protection applies only to employees who are members of specific churches. Section 19 states in pertinent part:

> Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' [*sic*] employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of Title 26 . . . .

In addition to Section 19, ten of those twenty-nine states have also passed legislation similar to Section 19 for the protection of their public sector employees or private sector employees not covered by the NLRA.[1]

All of these state statutes which protect religious believers from union security provisions were enacted after the passage of Section 19 of the NLRA. A comparison of the provisions of these statutes show that they are generally patterned after the provisions of Section 19.

II. The Legislative History Of Section 19

Section 19 was originally part of the 1974 amendments to the NLRA which brought nonprofit, nonpublic hospitals within its coverage. A review of the legislative history shows that Section 19 was originally adopted to address a specific problem.

Part of the debate over the "hospital amendments" arose over the fact that many of these hospitals were run by religious organizations.[2] One of these organizations, the Seventh-day Adventist Church, had a particular com-

[1] *Alaska* - Alaska Stat. § 23.40.225 (Cum. Supp. 1987), Public Utilities and Carriers, Alaska Stat. § 42.40.880 (Cum. Supp. 1987); *California* - Cal. Gov't Code § 3546.3 (West 1988), Cal. Gov't Code § 3515.7 (West 1988), Cal. Gov't Code § 3502.5(a) (West 1988); *Hawaii* - Haw. Rev. Stat. § 377-4.5 (1985), Haw. Rev. Stat. § 89-3.5 (1985); *Illinois* - Ill. Ann. Stat. ch. 48 ¶ 1606 § 6(g) (Smith-Hurd 1986), Ill. Ann. Stat. ch. 48 ¶ 1711 § 11 (Smith-Hurd 1986); *Montana* - Mont. Code Ann. § 39-31-204 (1987); *Ohio* - Ohio Rev. Code Ann. § 4117.09(C) (Anderson 1987 Supp.); *Oregon* - Or. Rev. Stat. § 243.666 (1987); *Pennsylvania* - Title 43 ch. 19 § 2215(h) (1988 CCH Public Employee Bargaining ¶ 27,417); *Washington* - Wash. Rev. Code Ann. § 28B.52.045(3) (1988), Wash. Rev. Code Ann. § 41.59.100 (1988), Wash. Rev. Code Ann. § 47.64.160 (1986); *Wisconsin* - Wis. Stat. Ann. § 111.85(d) (West 1988).

[2] 120 Cong. Rec. 12,955-56 (1974) (Remarks of Senator Cranston).

plaint. The church taught its members to refrain from joining or financially supporting labor unions. How could the church, as the owner of a large number of hospitals, bargain in good faith with a union over union security clauses which would compel this proscribed support of unions?[3]

The problem was particularly acute in the eyes of Adventist church leadership because the church's hospitals employed large numbers of its own church members. How could the church teach that members should not support unions, yet compel that very support through a collective bargaining agreement?

An amendment was introduced by Senator Sam Ervin to cure this conflict and exempt Seventh-day Adventist hospitals, among others, from the coverage of the hospital amendments.[4] This amendment lost. The debate reveals that one of the chief reasons it lost was that the Senate did not want to exempt a large number of employers from the obligation to bargain and thus exclude from the benefits of collective bargaining a large number of hospital employees.[5]

Still concerned about this problem, Congress took another tack to avoid the conflict between the teachings of the church and the interest in extending the NLRA over Adventist hospitals. The House approached it from the point of view of the employee (church member) instead of the employer (church hospital).[6] An amend-

[3] 120 Cong. Rec. 12,950-55 (1974) (Remarks of Senator Ervin including Brief of Seventh-day Adventist Church and Statement of Melvin Adams).

[4] *Id.*

[5] 120 Cong. Rec. 12,968 (1974) (Remarks of Senator Cranston).

[6] Senator Dominick had also introduced in the Senate an amendment which would allow employees to make an alternative charitable payment. This amendment was tabled. 120 Cong. Rec. 13,536-43 (1974).

ment (now Section 19) was proposed by Representative Erlenborn to exempt from the coverage of union security clauses hospital employees who were members of churches which taught that church members should not become union members.[7] This amendment passed the House.[8] Later, in a conference committee, the House language adding Section 19 was incorporated into the conference resolution and language was added requiring an alternative payment to a charity.[9]

In 1980 Section 19 was amended to broaden its coverage from health care employees to all employees covered by the NLRA.[10] Legislative history for the 1980 amendment is limited. There was no Senate report and no meaningful debate in the Senate. The debate in the House discussed Title VII cases (Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*) that had been decided since the 1974 amendments,[11] and made clear that the purpose of the amendment was to bring the NLRA into accord with the cases decided under Title VII[12] and to make it consistent with the First Amendment's guarantee of free exercise of religion. Representative Erlenborn explained the intent:

> H.R. 4774 does not "establish" a religion, nor does it favor one religion over another. H.R. 4774 does not interfere with an employer or a union's right to enter into union security agreements. Those parties are still free to contract. They will no longer be free, however, to contract away an individual's constitutional right to the free exercise of religious practice or belief. H.R. 4774 is, simply, a bill to rationalize the conflict between the Constitutional guarantee of freedom of religion and freedom to practice religion and our Federal labor laws.[13]

[7] 120 Cong. Rec. 16,914 (1974).

[8] 120 Cong. Rec. 16,915-16 (1974).

[9] 120 Cong. Rec. 22,575 (Remarks of Senator Williams) and 22,577 (1974) (Remarks of Senator Cranston).

[10] 126 Cong. Rec. 2579-80 (1980) (Remarks of Representative Thompson).

[11] For example, see 126 Cong. Rec. 2581-82 (1980) (Remarks of Representative Clausen).

[12] *Id.*

Thus, the genesis of Section 19 was to work out a solution for Seventh-day Adventists whose hospitals and employees were now being drawn within the coverage of the NLRA. The actual language used provided protection for only a relatively few—primarily members of certain Amish-Mennonite groups, Old German Baptists, Plymouth Brethren IV and Seventh-day Adventists.[14] However, the 1980 amendment expanded its coverage far beyond its original purpose to work out a solution for employees of Seventh-day Adventist hospitals.

III. Protecting The Religious Freedom Of A Limited Number Of Individuals Is Contrary To The Intent Of The Framers Of The Constitution And Past Precedents Of This Court.

A. The Intent Of The Framers Of The Constitution

Two hundred years ago a great contest took place in Virginia to determine whether an official preference would continue to be shown to the Episcopal Church. Ultimately, the preference was taken away and that church was completely disestablished through the enact-

[13] 126 Cong. Rec. 2584 (1980) (Remarks of Representative Erlenborn).

[14] 126 Cong. Rec. 3407 (1980) (Remarks of Senator Melcher).

ment in 1786 of Jefferson's Bill for Establishing Religious Freedom. The preamble to that bill stated in part:

> That our civil rights have no dependence on our religious opinions, any more than on our opinions in physics or geometry; that therefore the proscribing of any citizen as unworthy of public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right . . . .[15]

This unique idea that an individual's ability to hold public office or accept public benefit should not turn on his association with the views of a certain church or religious organization was also advanced at the Federal Constitutional Convention in Philadelphia in 1787. There, Charles Pinckney of South Carolina suggested the language which, in modified form, became that part of Article VI of the Constitution which prohibits religious tests for public office or a position of public trust.[16]

When the various states held conventions on the adoption of the Federal Constitution, the wisdom of Article VI was debated. In Massachusetts, Reverend Shute, who was a delegate to the convention, argued with regard to that article, "the proposed plan of government, in this particular, is wisely constructed; that, as all have an equal claim to the blessings of the government under which they live, and which they support, so none should

[15] L. Pfeffer, *Church State and Freedom* 253 (revised ed., Beacon Press 1967).

[16] *Id.*

be excluded from them for being of any particular denomination in religion."[17]

The idea powering Jefferson's Virginia bill and Article VI of the Constitution that a man's relationship with his government should not turn on the nature of his religious beliefs was later immortalized in the First Amendment. This Court has repeatedly acknowledged that the First Amendment contains the same objectives and was intended to provide the same protections against government intrusion upon religious liberty as Jefferson's Virginia statute. *See, e.g., Everson v. Board of Education*, 330 U.S. 1, 13 (1947); *Reynolds v. United States*, 98 U.S. 145, 164 (1879).

B. Past Precedents

Consistently, this Court has hewed to the line that religion is a personal matter between God and the individual with the result that the state is ill-equipped to interfere in these matters. In *Watson v. Jones*, 80 U.S. 679, 728 (1872), this Court opined, "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." The teaching of *Watson* is that civil courts should avoid determining what is or is not correct religious doctrine and should embark upon such a course only when "a civil right depends upon an ecclesiastical matter." *Watson*, at 731.[18]

[17] J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 119, Vol. 2 (2d ed., J.B. Lippincott & Co. 1896).

[18] The decision of the court below highlights the general incompetence of the judiciary in handling ecclesiastical matters. The court on one page of its decision describes the religious beliefs of Seventh-day Adventists in the context of its discussion of Sherbert v. Verner, 374 U.S. 398 (1963), and Hobbie v. Unemployment Compensation Appeals Commission, 480

(continued)

Again, in *West Virginia State Board of Education v. Barnette*, this Court declared that the state could not prescribe what would be orthodox in religion. It underscored the primacy of individual religious belief by noting that freedom of religious belief "may not be submitted to vote" and "depends on the outcome of no election." 319 U.S. 624, 638, 642 (1943).

In *United States v. Ballard*, 322 U.S. 78 (1944), this Court once again declared that religious belief is a matter of individual determination which cannot be subjected to approval by the state. The Court said that the right to religious belief

> embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths . . . . Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others.

322 U.S. at 86.

Later, while acknowledging that public employment was not a right, this Court nevertheless determined that it was unconstitutional to require an individual to affirm belief in any religious doctrine as a condition of holding

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U.S. 136 (1987). It notes that Saturday is the Sabbath day of members of that faith. Four paragraphs later the court launches into a historical/doctrinal discussion of the holy day of Christians, Jews and Moslems. In that discussion it announces that the holy day for Christians is Sunday and the holy day for Jewish people is Sabbath. Apparently it overlooked the fact that it had just announced that the Christians who make up the Seventh-day Adventist Church observe Saturday as their holy day. Compare Frazee v. Department of Employment Security, 159 Ill. App. 3d 474, 476, 512 N.E.2d 789, 790 (1987) with 159 Ill. App. 3d at 477, 512 N.E.2d at 791.

public office. *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961).

In *United States v. Seeger*, 380 U.S. 163 (1965), the concurring opinion of Justice Douglas specifically disclaimed the constitutionality of any statute which "embraced one religious faith rather than another" or "prefer[red] some religions over others." 380 U.S. at 188.

Perhaps this Court's clearest statement that one religious denomination cannot be preferred over another was made in *Larson v. Valente*, 456 U.S. 228 (1982). In that case this Court said, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." 456 U.S. at 244. In *Larson* this Court determined that it was improper to allow some churches to solicit funds for charity while barring other churches from soliciting on the same terms.

Taken together, these cases stand for the proposition that, when viewed through the eyes of the government, one man's religious beliefs are no better and no worse than the beliefs of another. Whether the beliefs are held by millions or hundreds or just one, whether they are solemnly written in church books or only in a man's heart, does not matter.

The actual application of this doctrine to facts almost identical to those before this Court occurred in the aftermath of *Larson*.

A few days after *Larson* was handed down, this Court issued a decision in *Grant v. Washington Public Employment Relations Commission*, 456 U.S. 955 (1982). In *Grant*, the Washington Supreme Court interpreted a state

statute which is one of those patterned after Section 19 of the NLRA. That statute, Washington Revised Code § 41.56.122 (1981), stated in pertinent part:

> [Collective bargaining] agreements involving union security provisions must safeguard the right of non-association of public employees based upon bona fide religious tenets or teachings of a church or religious body of which such public employee is a member. Such public employee shall pay an amount of money equivalent to regular union dues and initiation fee to a nonreligious charity or to another charitable organization mutually agreed upon . . . .

The Washington Supreme Court reached the conclusion that this statute only protected religious objectors who were members of organized religions which taught specifically stated beliefs. *Grant v. Spellman*, 96 Wash.2d 454, 635 P.2d 1071 (1981). When the religious objector petitioned for certiorari, this Court granted the petition, vacated the opinion of the Washington Supreme Court and remanded "for further consideration in light of *Larson v. Valente*." *Grant v. Washington Public Employment Relations Commission*, 456 U.S. at 955 (citation omitted).

Although this Court's decision to vacate and remand *Grant v. Spellman* did not amount to a final determination on the merits, *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964), it is fair to say that this Court believes that *Larson* has a great deal of relevance to the question presented in this case. Further, it indicates that this Court believed that *Grant v. Spellman* would have been decided differently if the Washington Supreme Court had considered this Court's decision in *Larson*. *Board of Trustees v. Sweeney*, 439 U.S. 24, 25-26 (1978) (Stevens, J., dissenting); *Henry*, 376 U.S. at 777.

Upon remand to the Washington Supreme Court, that court agreed that *Larson* taught the impropriety of extending religious protection only to employees who are members of certain churches. *Grant v. Spellman*, 99 Wash.2d at 822-26, 664 P.2d at 1232-33 (Williams, C.J., concurring specially) (six of nine justices of the court concurred in Williams' constitutional analysis).

Taken together, the intent of the framers of the Constitution and the past precedents of this Court give irrepressible force to the argument that it is absolutely improper to elevate corporate religious belief over the sincerely held personal religious beliefs of an individual.

IV. The Proper Remedy Is To Broadly Protect All Religious Belief.

If this Court continues the tradition of protecting individual religious belief, if this Court determines that the Appellate Court of Illinois may not create a church membership requirement, if this Court finds that it is improper to condition the charity substitution payment permitted by Section 19 and other similar state statutes upon membership in a specific church, what is the remedy?

This Court could, like the Washington Supreme Court, broaden the protection to apply to all religious believers or it could strike down the religious exemption. The appropriate remedy, at least in the context of union security agreements, brings us back to a discussion of the original intent of the framers of the Constitution, the legislative history of Section 19 and past precedents of this Court dealing with union security agreements.

A. The Legislative History Of Section 19 Supports A Broad Construction Of That Act.

The discussion in Section II of this brief demonstrates that the House discussion of the 1980 Amendment to Section 19 made clear that the purpose of the Amendment was to bring the NLRA into accord with cases decided under Title VII.[19] Title VII of the Civil Rights Act of 1964 has not been construed to protect only members of certain churches. On the contrary, the religious discrimination provisions of that statute have been extended to protect even an atheist! *Young v. Southwest Savings & Loan Association*, 509 F.2d 140 (5th Cir. 1975). If Congress intended Section 19 to remain as a parochial remedy for the problem of Seventh-day Adventist employees in Seventh-day Adventist hospitals, it would make no sense whatsoever to expand the scope of Section 19 beyond employees of health care providers. That the 1980 amendment did expand the coverage of Section 19 to all employees is powerful evidence that Congress intended to protect religious objectors in general.

B. Intent Of The Framers Of The Constitution

While battles raged in the various states in the late 1700's over the question of whether or not an individual could be compelled to support a specific church, by the time of the enactment of the Fourteenth Amendment the matter had been resolved. A consensus was reached by the people that an individual should be free to choose which church (if any) they would like to support.[20]

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[19] For example, see 126 Cong. Rec. 2581-82 (1980) (Remarks of Representative Clausen).

[20] Pfeffer, n. 7, *supra*, 115-18, 161.

While a consensus was reached at least a hundred years ago that it was improper to compel an individual to support financially a church which he did not choose, one class of private institutions ultimately escaped this rule. With the enactment of the NLRA in 1935, the consensus that individuals could not be compelled, against their will, to support private organizations came unraveled. Unlike the Railway Labor Act of 1926, which made an employee's membership or nonmembership in a labor union completely irrelevant to his employment, the 1935 NLRA allowed membership in a labor union to be made a condition of employment.[21]

When cases dealing with the constitutionality of this requirement came before this Court, some of the great treatises written to support the fight against the establishment of certain churches were thought relevant in this new debate over compulsion. This Court cited James Madison's *Memorial and Remonstrance Against Religious Assessment* in which he argued that, "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." Also cited was the preamble to Thomas Jefferson's Bill for Establishing Religious Freedom, in which he said it is "sinful and tyrannical" to "compel a man to furnish contributions for the propagation of opinions which he disbelieves . . . ." *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 305 & n.15 (1986); *Abood v. Detroit Board of Education*, 431 U.S. 209, 234 n.31 (1977).

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[21] T. Haggard., *Compulsory Unionism, The NLRB, and The Courts* 30-31 (Industrial Research Unit, University of Pennsylvania 1977).

Thus, the debate over religious freedom from compulsory support for church organizations is applicable to the debate over the compulsory support of labor unions by religious objectors. The conclusion reached should be the same: it is just as inconsistent with the principles of individual liberty to compel the support of religious organizations as it is to compel the support of labor unions by religious objectors.

C. Past Precedents

Despite a century-long consensus in this country that an individual should not be required to support a private organization which he did not choose, this Court, in a series of cases culminating with *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), held that it was constitutional to force an employee to pay a compulsory fee to a labor union.

This Court recognized that compelling employees against their will to pay such fees was a "significant impingement on first amendment rights." *Ellis v. BRAC*, 466 U.S. 435, 455 (1984). Such an infringement was permitted, however, on the basis that the state had expressed a compelling interest in requiring payment of these compulsory fees. *Abood*, 431 U.S. at 224-25, 225 n.20. A compelling state interest in requiring only some (but not all) religious objectors to pay agency fees must be shown here, not simply because compelling fees to unions is a significant infringement on First Amendment rights, but also because a compelling state interest must be shown to support laws which distinguish between religions. *Larson*, 456 U.S. at 246-47.

No such interest is expressed in Section 19 of the NLRA or the state statutes cited in this brief. To the contrary,

Congress and the state legislatures have affirmatively disclaimed any interest in compelling those with religious beliefs to pay a fee to a labor union. Instead, they have expressed an interest in creating an alternative for religious objectors which would allow them to redirect their fees to a charity. Obviously, this is an expression of interest in compelling payment by all employees, but not necessarily payment to a union.

In the absence of the expression of a compelling state interest requiring employees to pay compulsory fees to a union, the employees' First Amendment right to freedom of choice stands unsullied.[22] Since Congress and the various state legislatures have expressed no interest in requiring religious objectors to pay fees to labor unions, and to the contrary have expressed an interest in relieving them of that obligation through payments to a charity, the appropriate remedy in this case is to declare that all religious objectors, without regard to church membership, are entitled to protection. That is the result reached by the Washington Supreme Court upon remand from this Court in *Grant v. Spellman*.

CONCLUSION

The court below limited religious freedom to those who are members of specific churches. That decision was purely the creation of the court and did not rest upon any statutory command. This Court has consistently held, in keeping with the intent of those who wrote the Constitution, that religious belief that arises from an

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[22] The employees' freedom is unsullied only as to support for the union. Obviously, Congress has expressed an interest in having the employees be compelled to pay fees to a charity.

individual's relationship to his God is as entitled to protection as religious belief that is dictated by organized religion. For that reason, the decision of the court below should be reversed.

It is requested that when this Court rules upon the propriety of limiting religious freedom to those who are members of certain churches, it consider the impact of the decision on the most common context in which this limitation occurs. When this limitation is found in a statute, such as Section 19, the appropriate remedy is to broaden the exemption instead of striking it down.

Respectfully submitted,

BRUCE N. CAMERON
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Counsel of Record for
Amici Curiae

AMICUS CURIAE

BRIEF

(1)

No. 87-1945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM A. FRAZEE, *Appellant*,

v.

DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD, Director of the Illinois Department of Employment Security; BRUCE W. BARNES, Chairman, Board of Review, and KELLY SERVICES,

Appellees.

On Appeal From The Appellate Court Of Illinois For The Third District

BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AND THE AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

LEE BOOTHBY
Counsel of Record
BOOTHBY, ZIPRICK & YINGST
208 W. Mars Street
Berrien Springs, MI 49103
(616) 471-7787

SAMUEL RABINOVE
RICHARD T. FOLTIN
The American Jewish Committee
165 E. 56 Street
New York, NY 10022-2746
(212) 751-4000
Attorneys for Amici Curiae

Of Counsel:
ROBERT W. NIXON
6840 Eastern Avenue, NW
Washington, DC 20012
HAROLD J. LANCE
204 N. San Antonio Avenue
Ontario, CA 91762
ROLLAND TRUMAN
4522 GREENMEADOW ROAD
LONG BEACH, CA 90808

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1945

WILLIAM A. FRAZEE,

Appellant,

v.

DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD, Director of the Illinois Department of Employment Security; BRUCE W. BARNES, Chairman, Board of Review, and KELLY SERVICES,

Appelles.

On Appeal From The Appelate Court of Illinois For The Third District

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BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AND THE AMERICAN JEWISH COMMITTEE *AMICU CURIAE* IN SUPPORT OF APPELLANT

STATEMENT OF INTEREST

The Council on Religious Freedom is a nonprofit corporation which was formed to uphold and promote the principles of religious liberty. The objectives and purposes of the organization include taking action to eliminate religious discrimination in public and private employment and other areas of concern which interfere with the full experience of religious freedom.

Its Board of Directors is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis, and who recognize the importance of preserving and promoting the constitutional principle of the free exercise of religion and opposing any encroachment by private or governmental agencies which limit or tend to inhibit the free exercise of religion.

The American Jewish Committee (AJC), a national organization of approximately 50,000 members founded in 1906, is dedicated to the defense of the civil rights and civil liberties of all Americans. The AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty and has proved of inestimable value to the free exercise of religion in our pluralistic society.

The American Jewish Committee, as part of its commitment to a broad interpretation of the protection afforded under the Free Exercise Clause, has supported entitlement to unemployment compensation benefits if refusal to accept a particular job is based on a conflict between proffered employment and religious belief. Thus, AJC filed a brief *amicus curiae* some 25 years ago in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and more recently in *Hobbie* v. *Unemployment Appeals Commissioner of Florida*, 107 S.Ct. 1046 (1987).

SUMMARY OF ARGUMENT

The Appellate Court of Illinois, insensitive to personal religious beliefs, has declared that only individuals who are members of established religious sects or churches, which have declared tenets or dogmas requiring or proscribing certain religious conduct, are entitled to claim the protection of the Free Exercise Clause, as interpreted by this Court, when applying for unemployment benefits. This distorted interpretation of this Court's holdings in

Sherbert v. *Verner*, 374 U.S. 398 (1963); *Thomas* v. *Review Board*, 450 U.S. 707 (1981); and *Hobbie* v. *Unemployment Appeals Commissioner of Florida*, 107 S.Ct. 1046 (1987), is totally inconsistent with the reasoning of this Court in *Sherbert* and its progeny.

The state court's opinion ignores totally the fact that the Bill of Rights is principally a document intended to guarantee *individual* rights and embodies concepts of natural or inalienable rights. Therefore, when it invokes the Free Exercise Clause only to protect members of established religious sects or churches, while excluding nonmembers who personally hold similar religious beliefs with equal fervor, the state court stands our Bill of Rights on its head.

Clearly, this Court's holding in *Sherbert* condemns all state action which denies the receipt of public benefits by any individual because of their religious beliefs. Public benefits cannot be parceled out or denied under the principles announced in *Sherbert* on the basis of membership in some corporate church body. The thrust of *Sherbert* is directed toward prohibiting the state from coercing an *individual* to renounce his or her religious beliefs in order to receive public benefits.

It is not within the judicial function or competence to inquire into an individual's belief so long as it is determined that the individual is sincere and that the belief is religiously based. The ruling of the Illinois court violates the principle of religious neutrality which the Religion Clauses of the First Amendment require. The state court's ruling will not only exclude from unemployment benefits those who are not members of established sects or churches but will also exclude members of religious traditions that leave the decision as to many vital religious concerns to an individualized standard of religious observance.

The state has not demonstrated that it has a compelling governmental interest in excluding those unemployed individuals from unemployment compensation because of their nonmembership in an established sect or church. The suggestion made by the Illinois court that it is necessary to exclude nonmembers who are unable to accept work during their Sabbath in order to prevent chaos from occurring in the state's unemployment program through the filing of spurious claims is nothing more than unsubstantiated speculation. It is incumbent upon the state to demonstrate that such would be the case and that there is no viable alternative to prevent such spurious claims from being filed.

The state court's opinion not only violates free exercise principles but is in direct conflict with core Establishment Clause principles. To be consistent with this Court's Establishment Clause rulings, there can be no official favoritism either among religious sects or between individuals on the basis of membership in some established religious community. If the state court's "membership in an establishment religious body" test were permitted to be applied, it would undermine this Court's Establishment Clause reasoning in *Sherbert*. To hold that a member of an established church with tenets proscribing Sabbath secular employment is entitled to constitutional protection, while withholding the same constitutional guarantee to an unaffiliated Sunday worshipper who believes with equal fervor that he should not work on Sunday for religious reasons, would give preferential constitutional protection to members of any established churches requiring strict Sabbath observance. This would be out of step with everything this Court has ever said concerning the proscriptions of the Establishment Clause.

As in *Sherbert*, the Illinois Unemployment Insurance Act has created a mechanism for individualized exemptions. As this Court has said, failure to provide unemployment compensation to an individual who has refused work for religiously-based reasons, while granting them for secular reasons, would be discriminatory and show hostility toward religion. The position taken here by the Illinois court, however, not only discriminates against religiously-based "good cause" reasons for refusal to work, but goes even further to discriminate between individuals holding similar religious views. The Illinois court's reasoning must therefore be rejected.

ARGUMENT

I. THE DENIAL OF UNEMPLOYMENT BENEFITS TO APPELLANT ON THE GROUNDS THAT HIS RELIGIOUS BELIEFS WERE PERSONAL RATHER THAN AS A MEMBER OF AN ESTABLISHED RELIGIOUS SECT VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

William A. Frazee, the employee and appellant in this case, was denied unemployment benefits by the State of Illinois "due to his refusal to work" because of sincerely-held personal religious beliefs. *Frazee* v. *Department of Employment Security*, 512 N.E.2d 789, 790 (Ill. App. 3d 1987). Section 603 of the Illinois Unemployment Insurance Act (Ill. Rev. Stat. 1985, ch. 48, para. 433) provides that an unemployed worker is rendered ineligible for benefits if the claimant fails, without good cause, to accept suitable work.

The Illinois Appellate Court did not question this Court's previous determination in *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963), that governmental imposition on an unemployed worker of the choice between adhering to his religious beliefs and forfeiting unemployment benefits and accepting work in violation of his religious precepts places the same kind of burden upon the free exercise of religion as would a fine imposed upon this same individual's Sabbath worship. In fact, the Illinois court specifi-

cally referred to this Court's conclusions in *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963); *Thomas* v. *Review Board*, 450 U.S. 707, 716-717 (1981); and *Hobbie* v. *Unemployment Compensation Appeals Commissioner of Florida*, 107 S.Ct. 1046, 1049 (1987).

The Illinois court, however, ignoring the central constitutional principles implicit in Sherbert and its progeny, attempted to distinguish the facts in those cases from the facts in this case, although acknowledging that the "dividing line between the plaintiff in the instant case and the claimants in the cases of *Thomas*, *Sherbert* and *Hobbie* may be . . . thin and fragile. . . ." *Frazee*, 512 N.E.2d[1] at 791. The Illinois court said:

> Our examination of the foregoing cases reveals that a common thread was running through each case, namely, that in each case the claimant was a member of an established religious sect or church; that each of the claimants in refusing to work at a particular place or time was exercising what was believed to be a tenet, belief or teaching of an established religious body.

Id.

With this flawed analysis, it was not surprising that the Illinois court in its conclusion of law determined that:

> The assertion by one that as a Christian he or she does not have to accept employment which entails Sunday working and that such refusal will not affect the right to receive unemployment compensation benefits is not supported by the law of our State. As

[1] The Illinois Court of Appeals, in setting forth the issue of law which it believed this case presented, stated:

> We have presented for determination in this appeal the question of whether the plaintiff's personal professed religious belief that he could not work on Sundays constituted good cause for his refusal of work.

Frazee, 512 N.E.2d at 790.

> heretofore stated, the injunction against Sunday labor must be found in a tenet or dogma of an established religious sect. The plaintiff in this case does not profess to be a member of any such sect.

Id. at 792.

This Court repeatedly has rejected similar arguments to support denial of unemployment benefits to Sabbatarians, including contentions that: 1) the integrity of the insurance fund would be adversely impaired unless the claim were denied, *Sherbert* v. *Verner*, 374 U.S. at 407; 2) such "personal" reasons would encourage widespread unemployment and cause great burden on the fund, *Thomas* v. *Review Board*, 450 U.S. 718; and 3) subsequent employee-caused changes in conditions of employment which cause work conflicts justify denial, *Hobbie* v. *Unemployment Appeals Commissioner of Florida*, 107 S.Ct. 1050-51. In applying the strict scrutiny test, this Court simply has not found a compelling state interest promulgated which would justify forcing a claimant to choose between either following the precepts of religious beliefs or forfeiting benefits.

This case represents yet another attempt by state agencies charged with administering state unemployment compensation statutes to utilize distinctions which are meaningless from a constitutional standpoint to attempt to undercut this Court's ruling in *Sherbert* v. *Verner*, 374, U.S. 398 (1963). That seminal case recognized that free exercise rights under the First Amendment are violated when unemployment benefits are denied to a worker who refuses to accept employment which requires the employee to work during that employee's Sabbath hours in violation of the employee's religious beliefs.

Throughout the American experience, the right to believe in and worship in accordance with one's own concept of the Supreme Deity has been declared by judges

and legislators alike to be a cherished and fundamental right at the very heart of an individual's freedom. *See West Virginia State Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 638 (1943). This right to exercise one's religion is protected under the Free Exercise Clause of the First Amendment and, along with the rights of free speech and press, occupies a "preferred position" in the constitutional hierarchy of protected rights. *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1973).

The landmark decision of *Sherbert* v. *Verner*, 374 U.S. 398 (1963), has given the Free Exercise Clause its present vitality. Of significance to the facts of this case is the *Sherbert* Court's discussion of public welfare benefits:

> [I]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. . . . In *Speiser* v. *Randall*, 357 U.S. 513, 78 S.Ct. 132, 2 L.Ed.2d 1460, we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms.

Sherbert, 374 U.S. at 404-05.[2] This Court, quoting from *Braunfeld* v. *Brown*, 366 U.S. 599, 607 (1961), further held in *Sherbert*:

> For "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."

Id. at 404.

The *Sherbert* Court stated in no uncertain words:

> [T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of *her religious* faith effectively penalizes the free exercise of her constitutional liberties.

Id. at 406 (emphasis supplied).

Sherbert generally condemns state action which denies the receipt of public benefits by the members of any faith because of their religious convictions. Sherbert teaches that conditions upon any public welfare benefits cannot be sustained if they operate, whatever their purpose, to inhibit or deter the free exercise of First Amendment freedoms.

Amici believe that the reasoning of the Appellate Court of Illinois ignores the values which the Religion Clauses of the First Amendment sought to protect and guarantee. *Amici* do not deny that the First Amendment guarantees certain free exercise rights to corporate religious bodies. However, the most basic concerns of those responsible for the adoption of the assurances provided in our Bill of Rights was the protection of individual rights against the tendency of a strong government to become totalitarian.[3] The Bill of Rights, including the First Amendment, was designed to protect all individuals equally against the state in matters that are of fundamental personal con-

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[2] The basic decision in *Sherbert* was itself a reaffirmation of a basic principle previously announced by this Court in *Everson* v. *Board of Ed.*, 330 U.S. 1, 16 (1947), that:

> [N]o State may "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."

Id. at 410 (emphasis in original).

[3] Chief Justice Rehnquist has recognized that "[d]uring the debates on the Thirteen Colonies over ratification of the Constitution, one of the arguments frequently used by opponents of ratification was that without a Bill of Rights guaranteeing individual liberty the new government carried with it a potential for tyranny." *Wallace* v. *Jaffree*, 472 U.S. 38, 92-93 (1985) (Rehnquist, J., dissenting).

cern.[4] As Professor Chester J. Antieau wrote about the origin of the principles contained in the language of the Bill of Rights:

> Virtually all of the rights embraced within the American Bills of Right have natural right origins. Indeed, Bills of Right in over half of the states, in constitutionalizing the basic rights, expressly employ the language of natural and inalienable rights.
>
> Of the now-called "fundamental rights" binding upon the states through the Fourteenth Amendment, practically all were deemed natural rights by the American Founding Fathers. This is assuredly so of freedom of religion. . . .

C. Antieau, *Modern Constitutional Law* 728 (1969).

This embodiment of the natural rights, particularly as it involves individual religious beliefs, found its way into the early opinion of this Court in *Davis* v. *Beason*, 133 U.S. 333, 342 (1890):

> The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they imposed as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect.

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[4] As Dr. Leo Pfeffer so aptly stated, "the smaller the minority, the more likely it is to need constitutional protection; the greater it is, the more likely it is to obtain the protection it needs through legislative exemption rather than judicial intervention." L. Pfeffer, *Church, State and Freedom* 616 (rev. ed. 1967).

Later, in *United States* v. *Ballard*, 322 U.S. 78, 86 (1944), this Court, citing *Watson* v. *Jones*, 13 Wall. 679 (1872), stated: "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." Further, this Court stated:

> Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *West Virginia State Bd. of Edu.* v. *Barnette*. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contain false representations. . . .

Id. at 86-87.

In *Jones* v. *Opelika*, 316 U.S. 584, 595 (1942), this Court embraced the inalienable right concept in a decision involving the Free Exercise Clause of the First Amendment, stating:

> Believing as this nation has from the first that the freedoms of worship and expression are closely akin to the illimitable privileges of thought itself, any legislation affecting those freedoms is scrutinized to see that the interference allowed are only those appropriate to the maintenance of a civilized society.

Again, in *West Virginia Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 642 (1943), this Court said:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can

> prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Thomas Jefferson said that to deny religious liberty "the danger must be imminent, and the degree great." *Writings of Thomas Jefferson* 228 (Memorial ed. 1905). Likewise, James Madison said that it was only when the very existence of the state was "manifestly endangered" that there could be a limitation on religious liberty. I. Brant, *James Madison, Virginia Revolutionary* 246 (1941). These views of Jefferson and Madison form the core test now utilized by this Court when the free exercise rights of individuals or churches are at stake.

In *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963), this Court, speaking of the power of the government to limit religious exercise, wrote: "'[O]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" In considering the competing interests of the state and individuals, this Court in *Sherbert*, *id.* at 403, 406, and 407, articulated a test to determine whether the government would be allowed to prevail over a free exercise claim: (1) is there a burden imposed on the exercise of religion? (2) if there is such a burden, is the infringement justified by a compelling governmental interest? and (3) even if a compelling governmental interest has been shown to exist, is there any less intrusive, alternative means available to meet the state's objectives?

The *Sherbert* decision requires that courts make a searching examination of any state interest which the government asserts to be compelling in order to justify an infringement on religious liberty and to closely scrutinize the claimed impediment to those state objectives if the

government is prevented from acting.[5] Nowhere within the *Sherbert* decision does this Court condition an individual's right to unemployment compensation upon the individual's membership in an *established* sect or church which maintains a religious tenet that mandates the conduct upon which a religious claim is based. This Court simply said:

> Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon *his religious convictions* respecting the day of rest.

Id. at 410 (emphasis supplied).

Justice Douglas, in a concurring opinion in *Sherbert* and in rejecting the South Carolina court's suggestion "that when it comes to a day of rest a Sabbatarian must conform with the scruples of the majority in order to obtain unemployment benefits," stated:

> The result turns not on the degree of injury, which may indeed be nonexistent by ordinary standards. The harm is the interference with the *individual's scruples or conscience*—an important area of privacy which the First Amendment fences off from government.

Id. at 412 (emphasis supplied).

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[5] As Justice O'Connor observed in *Goldman* v. *Weinberger*, 475 U.S. 503, 530 (1986) (O'Connor, J., dissenting), when the government is attempting to override an interest specifically protected by the Bill of Rights, such as the right to the free exercise of religion, "the government must show that the opposing interest it asserts is of especial importance before there is any chance that its claim can prevail." Justice O'Connor further stated that "since the Bill of Rights is expressly designed to protect the individual against the aggregated and sometimes intolerant powers of the state, the government must show that the interests asserted will in fact be substantially harmed by granting the type of exemption requested." *Id.*

In *Thomas* v. *Review Board*, this Court reversed a decision of the Supreme Court of Indiana which focused on issues constitutionally indistinguishable from the issues raised in this case:

> In discussing the petitioner's free exercise claim, the court stated: "A personal philosophical choice rather than a religious choice, does not rise to the level of a first amendment claim." Ind. 391 N.E.2d, at 1131. The court found the basis and the precise nature of Thomas' belief unclear8but it concluded that the belief was more "personal philosophical choice" than religious belief.

Thomas, 450 U.S. at 713.

To this, the *Thomas* Court properly rejoined that "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause, which by its terms, gives special protection to the exercise of religion." *Id.* However, this Court did not suggest that such a free exercise claim raised by a religious believer in an unemployment compensation case must be predicated upon a tenet of an established sect or church, but rather stated:

> The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task, as the division in the Indiana Supreme Court attests. However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; *religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.*

Id. (emphasis supplied).

The *Thomas* Court also noted that the Indiana Supreme Court had "concluded that although the claimant's reasons for quitting were described as religious, it was unclear what his belief was, and what the religious basis of his belief was." This Court further noted that "[i]n

that court's view, Thomas had made a merely 'personal philosophical choice rather than a religious choice.'" *Id.* at 714. This Court, however, scrutinized the Indiana court's rejection of Thomas' claim that his belief was religiously based:

> In reaching its conclusion, the Indiana court seems to have placed considerable reliance on the facts that Thomas was "struggling" with his beliefs and that he was not able to "articulate" his belief precisely. It noted, for example, that Thomas admitted before the referee that he would not object to "working for United States Steel or Inland Steel . . . produc[ing] the raw product necessary for the production of any kind of tank . . . [because I] would not be a direct party to whoever they shipped it to [and] would not be . . . chargeable in . . . conscience. . . ."

Id. at 715.

This Court, in spite of Thomas' difficulty in attempting to articulate his individualized religious belief, nevertheless noted that "*Thomas drew a line*, and it is not for us to say that the line he drew was an unreasonable one." *Id.* (emphasis supplied). The Court then stated the principle that "[c]ourts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Id.* This Court also noted that the Indiana court had attempted to determine what was the sect's doctrine on the question at issue:

> The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable.

Id. It was with abundant clarity that the Court declared:

> Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise *is not limited to beliefs which are shared by all of the members of a religious sect.* Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Id. at 715-16. (Emphasis supplied)

In its most recent Sabbatarian unemployment compensation case, *Hobbie* v. *Unemployment Appeals Commissioner of Florida*, 107 S.Ct. 1046, 1051 (1987), the Court stated, we think significantly, that "[t]he First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired." The Court, in a footnote, cited *United States* v. *Ballard*, 322 U.S. 78, 87 (1944), for the proposition that in applying the Free Exercise Clause courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs. The Court also cited *Callahan* v. *Woods*, 658 F.2d 679, 687 (9th Cir. 1981), which had held that "[s]o long as one's faith is religiously based at the time it is asserted, it should not matter, for constitutional purposes, whether that faith derived from revelation, study, upbringing, gradual evolution, or some source that appears entirely incomprehensible." *Id.* at 1051, n.9.

The Court further stated in *Hobbie* that "the salient inquiry under the Free Exercise Clause is the burden involved," and further observed:

> In *Sherbert*, *Thomas*, and the present case, the employee was forced to choose between fidelity to religious belief and continued employment; the forfeiture of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee's choice.

Id. at 1051. Nowhere in *Hobbie* is there even a hint that this Court would treat a Sabbatarian's claim to unemployment compensation any differently if the claimant were not a member of an established religious sect or church.

The free exercise of religion is not and, as we will see from the following section, must not be protected or denied on the basis of membership or non-membership in an established religious sect or church. To so hold stands the Bill of Rights on its head.

II. ANY REQUIREMENT THAT A FREE EXERCISE CLAIM TO GOVERNMENTAL ENTITLEMENTS IS DEPENDENT UPON MEMBERSHIP IN AN ESTABLISHED RELIGIOUS SECT OR CHURCH WITH A TENET OR DOGMA PROHIBITING SATURDAY OR SUNDAY SECULAR WORK WOULD BOTH UNCONSTITUTIONALLY ENTANGLE THE COURT IN ECCLESIASTICAL AFFAIRS AND EXCLUDE LEGITIMATE FREE EXERCISE CLAIMS.

In *Thomas* this Court also said that "[t]he determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task. . . . [T]he resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question." Thomas, 450 U.S. at 714. In *Thomas* this Court also said that "[c]ourts are not arbiters of scriptural interpretation." Id. at 716.

Even if it were constitutionally appropriate for courts to attempt to divine the ecclesiastical meaning of church dogma, tenets, and doctrine, such an exercise would merely complicate the process of determining what claims pursuant to the Free Exercise Clause of the First Amend-

ment should be given protection in any given case. Professor Douglas Laycock perceptively demonstrated the problem inherent in relying upon church doctrine in its analysis of free exercise concerns. He stated:

> Moreover, emphasis on doctrine and requirements ignore the fluidity of doctrine and the many factors that can contribute to doctrinal change. A church is a complex and dynamic organization, often including believers with a variety of views on important questions of faith, morals, and spirituality. The dominant view of what is central to the religion, and of what practices are required by the religion, may gradually change. Today's pious custom may be tomorrow's moral obligation, and vice versa.
>
> These characteristics of doctrinal change have two consequences. One is that the officially promulgated church doctrine, on which courts too often rely, is not a reliable indication of what the faithful believe. At best the officially promulgated view of a large denomination represents the dominant or most commonly held view; it cannot safely be imputed to every believer or every affiliated congregation. If an official statement of doctrine has not been revised in recent times, it may be that almost no one in the church still believes it. . . . This gap between the official doctrine and rank-and-file belief means that courts are prone to err in deciding whether activities of a local church or small group of believers are compelled by conscience.

D. Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1391 (1981).

The Book of Discipline of the United Methodist Church, 81-82 (1976) helps underscore Professor Laycock's pertinent observation:

> In charting a course between doctrinal dogmatism on the one hand and doctrinal indifferentism on the

> other, The United Methodist Church expects all its members to accept the challenge of responsible theological reflection. The absence of a single official theological system does not imply approval of theological perspectives currently dominant in the Church, nor disapproval of any serious exploration across new theological frontiers or the confronting of new issues, of which there are many. Indeed, it welcomes all serious theological opinions developed within the framework of our doctrinal heritage and guidelines, so long as they are not intolerant or exclusive toward other equally loyal opinions.
>
> Theological reflections do change as Christians become aware of new issues and crises. The Church's role in this tenuous process is to provide a stable and sustaining environment in which theological conflict can be constructive and productive. Our heritage and guidelines support this position. United Methodism in doctrinal lockstep is unthinkable. Fortified with doctrinal guidelines, we have a frame of reference which protects us from sliding into confusion. "Our present existing and established standards of doctrine" are not rigid or juridical. Flexibly interpreted and applied, they properly honor and respect the integrity of serious and thoughtful persons.
>
> . . . .
>
> Doctrinal statements are not the special province of any single body, board or agency in The United Methodist Church, nor is there any single doctrinal statement to be repeated or cited by all official pronouncements. As all members and groups are responsible for clarifying the theological premises on which they operate, they are likewise under the same rule of reference: loyalty to our heritage and guidelines, relevance to current needs and opportunities.

Id. at 84. If doctrinal statements of The United Methodist Church are not to be considered the last word on theologically appropriate standards for members of that Church,

they certainly should not constitute the only criteria to which secular courts are to look for such standards.

The Illinois court's analysis poses substantial problems for various religious traditions, including portions of American Jewry, which place even more explicit reliance on individualized standards of religious observance. For instance, Reform Judaism does not impose upon its adherents an obligation to refrain from work on the Sabbath. Reform Jewish doctrine does, however, provide that each Jew should incorporate into his or her life personally meaningful aspects of Jewish tradition—which could include a personal undertaking to refrain from Sabbath work. Thus, the Centenary Perspective of the Central Conference of American Rabbis, a major statement of the Reform Jewish rabbinical organization issued in 1976, "calls upon Reform Jews 'to exercise their individual autonomy.'" E. Borowitz, 3 *Reform Judaism Today* 45 (1978). As Rabbi Borowitz explains, "Reform Jews are called upon 'to confront' the claims of Jewish tradition. . . . [Confront] implies serious concern, but also the right to stand back from and, if necessary, dissent from what is before one. . . . Thus, the tradition is not seen as having the right to settle what we must do; instead the predilections of the individual Jew are legitimated here." *Id.* at 45-47. The exercise of individual autonomy in Reform Judaism extends to identification of individually appropriate modes of Sabbath observance. *See id.* at 48. *See also*, M. D. Bial, *Liberal Judaism at Home, The Practices of Modern Reform Judaism*, 3-9, 136-37 (rev. ed. 1971) ("[T]he synagog does not establish standards for members' individual and private lives.")[6]

[6] The Illinois court's undue reliance on membership in an established church or sect whose tenets include a prohibition on Sabbath work has potential for impact on other segments of the Jewish community as well. The stringency and centrality of the prohibition on Sabbath work for an observant Orthodox Jew is well known. *See* 14 *Encyclopedia Judaica*, "Sabbath" 558 (1971). An Orthodox Jew residing in an isolated area, far from any Jewish congregation, might well be unaffiliated with any synagogue. If "membership," as that term is used in the Illinois court's test, is to be understood literally, such an Orthodox Jew might, under that inappropriate test, also be denied the free exercise rights enunciated in *Sherbert* and *Hobbie*.

Likewise, congregational-type churches, such as those affiliated with the Southern Baptist Convention and other Baptist groups, which believe in the priesthood of all believers, a traditional theological concept that teaches that each member should determine his or her relationship to God, would find it difficult to claim free exercise protection under the analysis and conclusions reached by the Illinois court in this case. An individual Baptist of an independent Baptist congregation who believes abortion wrong might find available hospital employment religiously unacceptable but at the same time find it impossible to point to church dogma on this issue.

III. ANY SUGGESTION THAT NONMEMBERS SHOULD BE DENIED THE SAME FREE EXERCISE PROTECTION GRANTED TO MEMBERS OF AN ESTABLISHED SECT OR CHURCH ON THE BASIS THAT IT WILL INCREASE THE NUMBERS OF THOSE SEEKING UNEMPLOYMENT COMPENSATION MUST BE DISREGARDED.

The Illinois court in this case, after noting that the history of the significance of Sunday evolving from a designating a holy day into a day for rest, recreation, business, industry, and labor and suggesting that "[i]f all Americans were to abstain from working on Sunday, chaos would result" is not a sufficient justification to permit adoption of the test applied by the Appellate Court of Illinois here. That court merely assumes without any demonstrable evidence that without the established sect

or church condition, the floodgates will be opened for unemployment compensation claims.

The court's assertion to the contrary is at best hypothetical and speculative. Under the *Sherbert* test the state bears the responsibility of proving that there is a compelling state interest overriding the free exercise rights of the individual and no less restrictive alternative.[7]

This Court in *Thomas* v. *Review Board* drew the line. Free exercise protection is dependent not on membership in an established sect or church but on individual religious belief. There this Court commented:

> There is no evidence in the record to indicate that the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large enough to create "widespread unemployment," or even to seriously affect unemployment—and no such claim was advanced by the Review Board. Similarly, although detailed inquiry by employers into applicants' religious beliefs is undesirable, there is no evidence in the record to indicate that such inquiries will occur in Indiana, or that they have occurred in any of the states that extend benefits to people in the petitioner's position. Nor is there any reason to believe that the number of people terminating employment for religious reasons

[7] This Court in *Sherbert*, 374 U.S. at 407, noted that there was no proof in the record to sustain the state's contention that there was the possibility of fraudulent claims being filed by claimants feigning religious objection to Saturday work. The state claimed this would dilute the unemployment compensation fund and hinder the scheduling by employers of necessary Saturday work. This Court, however, suggested that "even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees [the state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."

> will be so great as to motivate employers to make such inquiries.

Thomas, 450 U.S. at 719.

It should be noted that courts do have the right to inquire into the sincerity of religious beliefs.[8] Professor Carl H. Esbeck, in considering such an inquiry, stated:

> Governmental respect for individual conscience grounded in religious belief is required by the free-exercise clause. There are three steps in every such cause of action. First, a claimant must show that his or her religious belief is sincerely held. Necessarily, however, this sincerity requirement involves an attenuated inquiry because of the injunction against civil courts' conducting inquests concerning the content of an individual's faith. Thus, the Supreme Court has said that religious claims must border on the "bizarre" before they can be refused credence by the courts. Stated differently, sincerity is not concerned so much with the reasonableness of what a claimant believes, but whether he or she believes it - a "fervency test."
>
> Second, a free-exercise claimant must show coercion of conscience, a difficult requirement. However, the Supreme Court has held that coercion is present in more instances than just state prohibitions of religious conduct and state requirements of conduct directly contrary to faith. Burdens that only indirectly trap the claimant in a "cruel choice" between faith and obedience to government will suffice; . . . .
>
> Finally, once the sincerity and coercion elements are shown, the burden of proof shifts to the state. At this point the free-exercise claimant prevails except in those rare instances in which the societal interests

[8] The Illinois court did not question the sincerity of appellant Frazee. *Frazee* v. *Department of Employment Security*, 512 N.E.2d at 791.

> are compelling and can be achieved by no other means less restrictive to conscience.

Esbeck, *The Establishment Clause: Assuring the Independence of Churches in a Neutral State, Government Intervention in Religious Affairs* II 44-45 (1986).

IV. THE STATE COURT'S DENIAL OF APPELLANT'S CONSTITUTIONAL CLAIM TO UNEMPLOYMENT COMPENSATION BECAUSE APPELLANT WAS NOT A MEMBER OF AN ESTABLISHED RELIGIOUS SECT OR CHURCH PROSCRIBING SUNDAY SECULAR EMPLOYMENT VIOLATES CORE PRINCIPLES OF THE ESTABLISHMENT CLAUSE.

The decisions of the Appellate Court of Illinois, if left to stand, also would result in a violation of the Establishment Clause. The Illinois court apparently would apply the *Sherbert* analysis and provide constitutional protection to a Sabbath observer's claim for unemployment compensation if, but only if, the claimant were a member of an established religious sect or church. *Frazee* v. *Department of Employment Security*, 512 N.E.2d 791. The court unambiguously held in *Frazee:*

> As heretofore stated, the injunction against Sunday labor must be found in a tenet or dogma of an established religious sect. The plaintiff in this case does not profess to be a member of any such sect.

Id. at 792.

A clearer violation of the Establishment Clause cannot be found, and it is shocking that in one brush stroke the state court would violate both the Free Exercise and Establishment Clauses. In *Gillette* v. *United States*, 401 U.S. 437, 449-450 (1971), this Court stated:

> An attack founded on disparate treatment of "religious" claims invokes what is perhaps the central purpose of the Establishment Clause—the purpose of insuring governmental neutrality in matters of

> religion. . . . The metaphor of a "wall" or impassible barrier between Church and State, taken too literally, may mislead constitutional analysis . . . but the Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact.

Further, the Court in *Gillette* warned that the question of governmental neutrality is not to be decided simply by a determination that the governmental action on its face makes no distinction between religions "for the Establishment Clause forbids subtle departures from neutrality," *id.* at 452.

In *Larson* v. *Valente*, 456 U.S. 228 (1982), although primarily addressing the question of a legislative preference of established religions over new religions, this Court stated:

> In *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), we stated unambiguously: "The First Amendment mandates governmental neutrality between religion and religion. . . . The state may not adopt programs or practices . . . which 'aid or oppose' any religion. . . . This prohibition is absolute." *Id.*, at 104, 106, citing *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 225 (1963). And Justice Goldberg cogently articulated the relationship between the Establishment Clause and the Free Exercise Clause when he said that "*[t]he fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it worked deterrents of no religious belief.*"

Id. at 246 (emphasis supplied).

In the context of an individual's claim to unemployment compensation based upon free exercise principles, this Court in *Sherbert* found that its holding did not foster the "establishment" of the Seventh-day Adventist religion in

South Carolina. This was because "the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." *Sherbert*, 374 U.S. at 409. *Also see Thomas* v. *Review Board*, 450 U.S. at 719-720.

In contrast, to hold that a member of an established church with tenets proscribing Sabbath secular employment is entitled to constitutional protection, while withholding the same constitutional guarantee to an unaffiliated Sunday worshipper who believes with equal fervor that he should not work on Sunday for religious reasons, would be a flagrant rejection of the governmental obligation of neutrality in the face of religious differences. It would, in fact, give preferential constitutional protection to members of any established church requiring strict Sabbath observance. Nothing could be further from the true meaning of the Religion Clauses of the First Amendment which were designed to guarantee not only religious freedom to members of established religious bodies but to all individuals holding sincere personal religious beliefs.

V. STRICT SCRUTINY SHOULD BE APPLIED TO PROHIBIT DENIAL OF UNEMPLOYMENT COMPENSATION BASED ON APPELLANT'S REFUSAL OF EMPLOYMENT FOR RELIGIOUS REASONS.

The Illinois statutory provision, as contained in its unemployment insurance statute, is set forth in the refusal of work section, that being section 603 of the Act (Ill. Rev. Stat. 1985, ch. 48, para. 433), which states in part:

> Refusal of work. An individual shall be ineligible for benefits if he has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the Director, or to accept suitable work when offered him by the employment office or an employing unit, or to return to his customary self-employment (if any) when so directed by the employment office or the Director.
>
> . . . .
>
> In determining whether or not any work is suitable for an individual, consideration shall be given to the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of employment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.

In the Declaration of Public Policy,[9] which the Illinois Legislature adopted concerning unemployment insurance, the legislation provided in section 100 of the Act (Ill. Rev. Stat. 1985, ch. 48, para. 300) as follows:

> As a guide to the interpretation and application of this Act the public policy of the State is declared as

[9] As indicated in section 603 of the Illinois Unemployment Insurance Act (the refusal of work provision) (part of which is quoted above), the "degree of risk involved to [an employee's] . . . morals" is to be considered in determining the suitability of work. It is ironic that this section of the Illinois Act, read together with section 300 of the Act which sets forth the declaration of public policy and which is provided as an aid to the Act's interpretation, would be administered in a manner which would itself pressure an individual to violate his or her religious beliefs. The Illinois court's interpretation of the "good cause" provision of the Act can only result in an assault on an individual's morals. In *Tary* v. *Board of Review*, 161 Ohio St. 251, 119 N.E.2d 56 (1954), and *Swenson* v. *Michigan Employment Security Comm.*, 340 Mich. 430, 65 N.W.2d 709 (1954), both of which are cited in *Sherbert*, 374 U.S. at 407, n.7, those courts held that each of those Sabbath observer plaintiffs were not disqualified for benefits since their morals would be seriously affected by having to violate sincere religious beliefs.

> follows: economic insecurity due to involuntary unemployment has become a serious menace to the health, safety, morals and welfare of the people of the State of Illinois. . . . It is the considered judgment of the General Assembly that in order to lessen the menace to the health, safety and morals of the people of Illinois, and to encourage stabilization of employment, compulsory unemployment insurance upon a statewide scale providing for the setting aside of reserves during periods of employment to be used to pay benefits during periods of unemployment, is necessary.

The Illinois courts have repeatedly held that the unemployment insurance statute should be given liberal construction. One case, *Mangan* v. *Bernardi*, 477 N.E.2d 13 (Ill. App. 3d 1985), held that because the unemployment compensation statute was passed with public welfare in mind, construction of its provisions should favor inclusion of employees in determining their employer's liability. Thus, the Illinois Unemployment Insurance statute specifically provides that an employee may refuse a work assignment and not be denied unemployment compensation benefits if the refusal is for good cause.

Sherbert v. *Verner* and *Hobbie* v. *Unemployment Appeals Commissioner of Florida* demonstrate that a state's determination to burden free exercise interests, by refusing unemployment compensation to one who declines to work on his Sabbath out of religious conviction, will be subject to strict scrutiny, seemingly without reference to whether a state has enacted a general good cause exemption. *Hobbie*, 107 S.Ct. at 1050. While former Chief Justice Burger, in *Bowen* v. *Roy*, 476 U.S. 693, 708 (1986), suggested that, absent a mechanism for individualized exemptions, a government regulation may not be subject to strict scrutiny even if it infringes on free exercise interests, the Court's opinion in *Hobbie* explicitly held that strict scrutiny is to be applied more broadly than

was asserted by the Chief Justice. *Hobbie*, 107 S.Ct. at 1050, n.7. But, even under the analysis proposed by the Chief Justice, strict scrutiny would have to be invoked here. Just as in *Sherbert* and *Hobbie*, the statute here at issue provides a good cause standard for individualized exemptions.

As the Chief Justice acknowledged, in propounding his analysis:

> If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. Thus, as was urged in *Thomas*, to consider a religiously motivated resignation to be "without good cause" tends to exhibit hostility, not neutrality, towards religion. . . . In those cases, therefore, it was appropriate to require the State to demonstrate a compelling reason for denying the requested exemption.

Id. Likewise, the Illinois statute has created a mechanism for individualized exemptions from the refusal to work provision of the statute and has applied a similar good cause justification standard. Therefore, in Illinois, an individual is permitted to receive unemployment compensation when he refuses work for certain secular reasons. Failure to provide unemployment compensation to an individual who has refused work for religiously-based reasons would be discriminatory and show hostility towards religion.

The constitutional analysis used by the Illinois court not only discriminates against religiously-based good cause reasons for refusal to accept work but goes even further and invidiously discriminates between individuals holding similar religious views with the deciding factor for granting free exercise rights being determined by membership in an established religious sect or church with tenets proscribing secular work on that religious organization's Sabbath. Both Justice Powell and Justice

Stevens found that an unemployment system which created a mechanism for individualized exemptions was discriminatory when that system, although permitting exemptions for certain secular reasons, refused to extend the exemption to instances of religious hardship. *See Hobbie*, 107 S.Ct. at 1052 (Powell, J., concurring) and 1053 (Stevens, J., concurring). If the former is unconstitutionally discriminatory, how much more discriminatory would be the granting of unemployment benefits to members of established religious sects or churches but not to those who have identical religious beliefs but do not hold membership in a church or sect that teaches that belief? As Justice Stevens said in *Hobbie*, "[i]n such an instance, granting unemployment benefits is necessary to protect religious observers against unequal treatment. *Id.*

CONCLUSION

For the foregoing reasons, the decision of the Appellate Court of Illinois should be reversed.

Dated: November 17, 1988

LEE BOOTHBY
Counsel of Record
BOOTHBY, ZIPRICK & YINGST
208 W. Mars Street
Berrien Springs, MI 49103
(616) 471-7787

SAMUEL RABINOVE
RICHARD T. FOLTIN
The American Jewish Committee
165 E. 56 Street
New York, NY 10022-2746
(212) 751-4000
Attorneys for Amici Curiae

Of Counsel:
ROBERT W. NIXON
6840 Eastern Avenue, NW
Washington, DC 20012

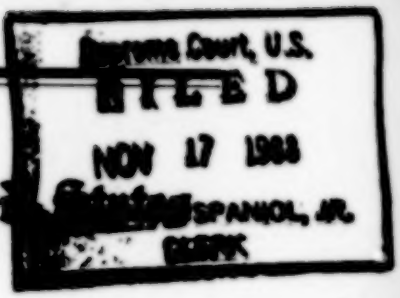
HAROLD J. LANCE
204 N. San Antonio Avenue
Ontario, CA 91762

ROLLAND TRUMAN
4522 GREENMEADOW ROAD
LONG BEACH, CA 90808

AMICUS CURIAE

BRIEF

No. 87-1945



IN THE

Supreme Court of the United States

October Term, 1988

WILLIAM A. FRAZEE,

Appellant,

v.

DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD, Director of the Illinois Department of Employment Security; and BRUCE W. BARNES, Chairman, Board of Review, and KELLY SERVICES,

Appellees.

BRIEF *AMICI CURIAE* IN SUPPORT OF APPELLANT OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF AND THE SYNAGOGUE COUNCIL OF AMERICA, THE AMERICAN CIVIL LIBERTIES UNION, THE CHRISTIAN LEGAL SOCIETY, THE NATIONAL ASSOCIATION OF EVANGELICALS, THE LORD'S DAY ALLIANCE OF THE UNITED STATES, AND THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

AMY ADELSON
Counsel of Record

LOIS C. WALDMAN
MARC D. STERN
JEREMY S. GARBER
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-4500

SARAH BARRINGER GORDON
FINE, KAPLAN & BLACK
1845 Walnut Street
Philadelphia, PA 19103
(215) 567-6565
Of Counsel

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INTEREST OF THE AMICI

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, economic and political rights of American Jews and all Americans. It is committed to the preservation of the great freedoms secured by the First Amendment to the Constitution, especially the rights secured by the Establishment and Free Exercise Clauses. To further these ends, AJCongress has filed briefs amicus curaie in numerous cases in state and federal courts in which the meaning of the religion clauses has been at issue.

As an organization representing a religious minority, AJCongress is concerned that the power of government not be used arbitrarily to suppress easily accommodated free exercise of

religion. In particular, AJCongress seeks to ensure that the religious practices of minority religions are not burdened or prohibited absent compelling justification.

The Synagogue Council of America is a co-ordinating body consisting of the orgnizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of: Central Conference of American Rabbis, representing the Reform Rabbinate; Rabbinical Assembly, representing the Conservative Rabbinate; Rabbinical Counsel of America, representing the Orthodox Rabbinate; Union of Amerian Hebrew Congregations, representing the Reform Congregations; Union of Orthodox Jewish Congregations of America, representing the Orthodox Congregations; and United Synagogue of America, representing the Conservative Congregations.

The American Civil Liberties Union (ACLU) is a nationwide non-partisan, membership organization dedicated to the principles of individual liberty embodied in the Bill of Rights. The issues of religious freedom presented by this case are, therefore, central to the ACLU's most basic concerns. Of particular relevance here, the ACLU participated as amicus curiae before this Court in Sherbert v. Verner, 374 U.S. 398 (1963), Thomas v. Review Board, 450 U.S. 398 (1963), and Hobbie v. Unemployment Appeals Comm., 107 S.Ct. 1046 (1986).

The Christian Legal Society is a non-profit professional association of 5,000 Christian judges, attorneys, law professors and law students, founded in 1961. The Center for Law and Religious Freedom is a division of the Christian Legal Society, founded in 1975 to protect

the free exercise of religion, supporting the appropriate accommodation by the state of religious belief and practices and the respect for religious rights as required by the First Amendment.

The National Association of Evangelicals, located in Wheaton, Illinois, is a non-profit association of evangelical Christian organizations, colleges, and universities, as well as some 50,000 churches from 74 denominations. It serves a constituency of approximately 15 million people.

The Lord's Day Alliance of the United States is a New York non-profit corporation with national headquarters in Atlanta, Georgia. Established 100 years ago, the Lord's Day Alliance of the United States has as its sole purpose the preservation, education and emphasis upon the Christian observance of the Fourth

Commandment, "Remember the Sabbath Day to keep it holy." It exists to help preserve the maintenance and cultivation of the Lord's Day as a day of rest, worship, Christian education and spiritual renewal. It does not believe that an individual's religious freedom rights depend upon church requirements or teachings, but rather are a matter of individual conscience before God. Twenty five denominations are represented by the Board of Managers, including some of the nation's leading religous leaders such as Dr. Norman Vincent Peale, Dr. Robert Schuller and General Earl Cocke.

The Baptist Joint Committee on Public Affairs is composed of representatives from eight National Cooperating Baptist Conventions and

Conferences in the United States. They are:

American Baptist Churches in the U.S.A.;
Baptist General Conference;
National Baptist Convention of America;
National Baptist Convention, U.S.A. Inc.;
North American Baptist Conference;
Progressive National Baptist Convention, Inc.;
Seventh Day Baptist General Conference; and
Southern Baptist Convention.

These constituent bodies have a total membership of approximately 30 million and reflect the traditional Baptist concern for proper church/state relations. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

This brief is submitted with the consent of the parties.

SUMMARY OF ARGUMENT

1. The State of Illinois denied William Frazee unemployment benefits after he turned down a job that required Sunday work. At his administrative hearing, Frazee was unable to specify the tenet of his church that dictated his refusal to work on Sunday. He testified, however, that as a Christian he felt that Sunday work was wrong, and that this belief stemmed from "his personal Christian faith in the Lord." Despite the patently religious nature of this testimony, the Illinois Appellate Court held that Frazee could not invoke the Free Exercise Clause because his observance of the Sunday Sabbath was not found in "the tenets or dogma of an established religious sect."

In Sherbert v. Verner, Thomas v. Review Board and Hobbie v. Unemployment

Appeals Commission, this Court held that, absent compelling reason, government cannot deny unemployment benefits to an individual who adheres to a religious belief that conflicts with a job requirement. Thomas also made clear that this principle applies even if the claimant's religious belief appears odd or incomprehensible and even if other members of the claimant's religious faith do not share his religious belief. Although the Illinois court cited Thomas, its limited view of the Free Exercise Clause flatly contradicts this critical aspect of the Thomas decision.

The lower court agreed that Frazee's belief in the sanctity of the Sunday Sabbath was sincere. Yet because it viewed Sunday as a day better devoted to secular activities, it failed to understand that Frazee's belief was firmly based in religious doctrine.

Strict observance of a Sunday Sabbath has its roots in the Christian interpretation of the Fourth Commandment. After the Protestant Reformation, Sunday Sabbatarianism became an increasingly prevalent religious practice, and in this country, observance of "the Lord's Day" was a unifying principle of diverse Protestant denominations well into the twentieth century. Even today, many Protestant denominations adhere to this principle, and many Christians remain concerned over whether and how strictly the Sunday Sabbath should be observed.

Although Frazee's strict observance of the Sunday Sabbath may no longer be a practice shared by most Christians, his belief in the holiness of the "Lord's Day" is a religious one and thus entitled to protection under the Free Exercise Clause.

2. The Illinois court denied Frazee's free exercise claim because, in its mistaken view, his belief in the sanctity of the Sunday Sabbath did not stem from the "tenets or dogma of an established religious sect". This restrictive standard for evaluating free exercise claims, even if correctly applied, is inconsistent with this Court's more expansive reading of the Free Exercise Clause, is offensive to the Establishment Clause, and creates insurmountable barriers to those individuals who raise free exercise claims in the context of informal hearings.

a. This Court has never demanded that an individual prove that a belief is based on the doctrine of an institutionalized religion in order for it to be considered "religious" under the Free Exercise Clause. To the contrary, recognizing the diverse ways in which beliefs

that are essentially religious may originate or be expressed, the Court has insisted only that free exercise claims be rooted in religion rather than purely secular considerations.

The Court has wisely understood that the tenets or dogma of a religion are flexible concepts and that different individuals will have different interpretations of the commands of their faith. But "courts are not arbiters of scriptural interpretation." Thomas v. Review Board. If an individual can prove that his sincerely held beliefs are essentially religious, those beliefs deserve First Amendment protection.

b. The standard of proof set out by the court below offends the most basic principle of the Establishment Clause: that government may not prefer one religious denomination over another.

The court below would deny religious liberty to individuals who are not members of "well-established sects." An adherent of a newly emerging religion -- at an earlier time, for example, Mormonism or Seventh Day Adventism -- would be stripped of free exercise protection. So would an individual who belongs to no church but who follows an intensely personal, individualistic religious creed. A clearer preference for one religion over another could not be expressed.

The state court standard also reflects a judicial preference for highly legalistic, heirarchical denominations that contain well-developed tenets or dogma. But Frazee is a Protestant and Protestantism stresses "private judgment" on scriptural matters. It is not uncommon for Protestants who belong to the same denomination to differ in their

interpretation of the scriptures. To discriminate against religions that permit "private judgments" is to violate the denominational neutrality at the heart of the First Amendment.

c. The state court's standard of proof has practical failings as well. Free exercise claims often arise at administrative or other informal hearings. The typical claimant is rarely represented by counsel and usually testifies without "preparation." He is unlikely to know that it will be necessary to precisely pinpoint the tenet of his faith that mandates his religious beliefs, nor is he likely to have the theological background necessary to support his claim under the state court's standard.

The rigid standard of proof set up by the state court could well create insurmountable barriers to the assertion

of free exercise claims by the unsophisticated and end up protecting only those whose religious beliefs are so widely held they are universally understood.

3. The Illinois court may have intended its limitation as a way of weeding out fraudulent claims. Obviously, if the parameters of the Free Exercise Clause are narrowed, fewer false claims will survive judicial scrutiny. But it is entirely possible for a very real and deeply held religious conviction to exist outside the scope of well-established religions with strict tenets and dogma, and it is equally possible for an individual to assert a false claim, but root it in established religious doctrine.

False claims can best be detected by closely examining a claimant's sincerity.

Courts routinely evaluate credibility, and while the sincerity inquiry is unquestionably a sensitive one, it is a standard component of the adjudicatory process. As this Court has often recognized, speculation about false claims, or, as here, about the "chaos" that will result if religion is accommodated, cannot justify restricting the guarantee of religious liberty embodied in the Free Exercise Clause.

I

DENYING UNEMPLOYMENT BENEFITS TO AN INDIVIDUAL WHOSE REFUSAL TO WORK ON THE SUNDAY SABBATH IS BASED ON HIS "PERSONAL CHRISTIAN FAITH IN THE LORD" VIOLATES THE FREE EXERCISE CLAUSE

William Frazee refused to accept a temporary job that would require Sunday work. At a hearing to determine whether he was eligible to receive unemployment benefits, he testified that he was a Christian, and that it was "against [his] faith" to work on Sunday, unless it was

"an essential service job such as where life is at stake." (CR 35 - 36).[1] When asked if this was a tenet of his church, he said "no ... as a Christian I feel it's wrong," but later in the hearing he explained that his refusal to work on Sunday stemmed from his "personal Christian faith in the Lord." (CR 41).

Frazee was denied unemployment benefits on the ground that "he refused an offer of suitable work without good cause." (JS 12a). This determination was upheld by the Appellate Court of Illinois. Frazee v. Department of Employment Security, 159 Ill. App. 3d. 474, 111 Ill. Dec. 400, 512 N.E.2d 789

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[1] References to "CR" are to the Transcript of Mr. Frazee's Hearing as found in the Common Law Record filed with the Illinois Appellate Court.

References to "JS" are to the Appendix to Appellants' Jurisdictional Statement, dated May 2, 1988.

(1987).[2] The Illinois court did not question the sincerity of Frazee's belief that it was wrong to work on Sunday. 159 Ill. App. 3d at 477, 512 N.E.2d at 791. It also recognized the "biblical mandates" for a Christian to observe the Sunday as a Sabbath. Id. at 488, 512 N.E.2d at 791. Nevertheless, because Frazee had not attributed his belief to a "tenet or dogma of an established sect," it held that Frazee was not entitled to First Amendment protection. Id. at 478, 512 N.E.2d at 792.

The decision of the Appellate Court of Illinois is plainly wrong. Frazee's refusal to work on Sunday manifested his genuine, deeply felt religious conviction, a conviction completely consistent with the "tenets and dogma" of Christianity. And as this Court has held on

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[2] The Illinois Supreme Court denied the petition for leave to appeal. No. 66057 (Feb. 3, 1988) (JS 9a).

three separate occasions, government cannot penalize an individual who chooses to adhere to a sincerely held, religious belief, even if that belief appears odd, illogical, or, as the lower court believed here, out of step with the trend of modern society.

A. Sherbert v. Verner, Thomas v. Review Board and Hobbie v. Unemployment Appeals Commission Control this Case

For more than a quarter of a century, this Court has recognized that government burdens religion when it denies a benefit to an individual because of conduct mandated by religious belief. Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Board, 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Commission, 107 S. Ct. 1046 (1986).[3]

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[3] Both Sherbert and Hobbie involved Seventh Day Adventists who were fired for refusing to work on the Sabbath, and who were then denied unemployment benefits. In both cases, this Court held that the denial of benefits infringed the

The continued viability of this principle is not now at issue. What is at issue is whether this case is controlled by a second principle announced in Thomas v. Review Board.[4] That principle, having its origins some forty years ago in United States v. Ballard, 322 U.S. 78, 87 (1944), guarantees religious freedom to all religious observers, including those who adhere to beliefs that are considered peculiar or idiosyncratic.

Thomas, a case strikingly similar to this case, involved a Jehovah's Witness who quit his job after he was transferred

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plaintiffs' free exercise rights because they were being forced "to choose between following the precepts of [their] religion and forfeiting benefits on the one hand, and abandoning one of the precepts of [their] religion in order to accept work, on the other hand." Sherbert, 374 U.S. at 404; Hobbie, 107 S.Ct. at 1049 (quoting Sherbert).

[4] The Illinois court paid lip service to Thomas, but then ignored its plain teaching in deciding this case.

to a department that produced turrets for military tanks. He claimed that assisting in the production of weapons violated his religious beliefs. At his unemployment benefits hearing, he testified that although a fellow Jehovah's Witness advised him that working with weapons was not "unscriptural," he could not "rest with" this view, which was less strict than his own reading of Witness principles. 450 U.S. at 711.

Just as the Illinois court did here, the state court in Thomas discounted the religious basis for Thomas' refusal to work, and concluded, as did the lower court here, that it was a "personal" decision, not a religious one. This Court, by a 8-1 vote, reversed.

Although reiterating that "only beliefs rooted in religion are protected

by the Free Exercise Clause,"[5] the Court in Thomas made it clear that the "difficult and delicate" task of determining what those beliefs are cannot turn on what is "acceptable, logical, consistent or comprehensible to others." 450 U.S. at 715. Nor is it fatal that another member of the religion disagrees with a claimant's interpretation of religious principles:

> [I]ntrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill-equipped to resolve such differences in relation to the religion clauses.... [T]he guarantee of free exercise is not limited to beliefs which are shared by all the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether

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5 See Wisconsin v. Yoder, 406 U.S. 205, 215-216 (1972) ("to have the protection of the religion clauses...claims must be rooted in religious belief"); United States v. Ballard, 322 U.S. 78, 86-87 (1944).

> the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Id. at 715-716 (emphasis added).

Thomas' beliefs may not have been shared by some or even most Jehovah's Witnesses, but they were sincere and undeniably rooted in religion. The state therefore, could not deny him unemployment benefits because he chose to adhere to those beliefs.[6]

Frazee's strict observance of the Sunday Sabbath,[7] like Thomas' interpretation of Witness principles, may not

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[6] The state in Thomas was unable to prove a compelling interest, narrowly tailored to minimize the infringement of religion. 450 U.S. at 718. The state here has made no attempt to prove a compelling interest in denying benefits to Frazee.

[7] A rule protecting the right of Saturday Sabbatarians, like Sherbert and Hobbie, to strictly observe their Sabbath, but withdrawing similar protection to Sunday Sabbatarians offends the Establishment Clause. Larson v. Valente,

be a religious precept shared by most Christians, who, in today's increasingly secular society, have other plans for the "Lord's Day." Frazee, however, has every right to disagree with this relatively recent change in religious practice.[8]

Frazee, like Thomas, also may have "struggled" to "articulate" the basis for his belief. But his testimony reflected

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456 U.S. 228, 244 (1982). See pps. 34-35 infra. It also reflects a lack of judicial sympathy for the beliefs of those Christians who more strictly interpret the commands of their faith.

8 Frazee's use of the term "Christian" to describe his religion may signify an effort to distinguish himself from more "modernist" Christian traditions since, for some, the term "Christians" refers only to "fundamentalist' Christians, and not to so-called cultural Christians. See, e.g., A. Peshkin, God's Choice: The Total World of a Fundamentalist Christian School 1 (1986). To fundamentalist Christians, Sunday is dominated by church activities. Id. at 65-66. Moreover, fundamentalist Christians often have "a highly individualized version of Christian faith." M. Marty, Religion and Republic, The American Circumstance 287-288 (1987).

his indisputably sincere and unquestionably religious view, based on his "personal Christian faith in the Lord" (CR 41), that the Sabbath must be kept "holy," and that work, other than what is necessary "to preserve and protect life," is forbidden. (CR 23).

Frazee chose to adhere to that belief, and, under Sherbert, Thomas and Hobbie, that choice cannot be penalized.

B. Christian Observance of a Sunday Sabbath is Neither "Bizarre" Nor "Non-Religious."

Of course, as this Court understood in Thomas, some beliefs may be "so bizarre, so clearly non-religious in motivation, as not to be entitled to protection under the Free Exercise

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See also New Life Baptist Church Academy v. East Longmeadow, 666 F.Supp 293, 302, n.9 (D. Mass 1987) ("Fundamentalist Christian churches share certain assumptions and beliefs, but each congregation must ultimately decide its own position on other scriptural questions").

Clause." 450 U.S. at 715, citing Wisconsin v. Yoder, 406 U.S. 205 (1971).

The Illinois Appellate Court summarized its view of why Sunday is an inappropriate day for strict religious observance:

> What would Sunday be today if professional football, baseball, basketball and tennis were barred. Today Sunday is not only a day for religion, but for recreation and labor. Today the supermarkets are open, service stations dispense fuel, utilities continue to serve the people and factories continue to belch smoke and tangible products.

159 Ill. App. 3d at 478, 512 N.E.2d at 792.

Obviously, to the Illinois court, which views Sunday as a day better devoted to sports and shopping, a Sunday dominated by religious observance is contrary to "the American way of life." Id. at 478, 512 N.E. 2d at 792. Perhaps. But it is not contrary to the Christian

way of life. For a Christian to treat the Sunday Sabbath as holy can hardly be characterized as "bizarre" or "non-religious in motivation," whether the inquiry is historical or descriptive of current theological practice. Strict observance of the "Lord's Day" is firmly based in religious principles.

Christian observance of the Sabbath has it roots in the Fourth Commandment: "Guard the Sabbath day to keep it holy, as the Lord your God has commanded you." Deuteronomy 5:12. The Protestant Reformation saw the emergence of a new theory of Christian Sabbatarianism. Strict observance of a Sunday Sabbath became a bedrock religious principle of Puritanism, which profoundly influenced "nearly all of the colonies and remained a vital aspect of national life well into the Twentieth century." W. Solberg, Redeem the Time 3 (1977).

Sunday Sabbatarianism was not restricted to the Puritans or their successors. The Evangelical Christian movement of the early nineteenth century, which so dominated American life, was united in its fervor to maintain strict Sabbath observance. "Protestant forces across a wide sweep of denominational and theological opinion persistently struggled for the Sabbath as a day apart." R. Handy, A Christian America 45 (2d ed. 1984). After the Civil War, the Sabbatarian movement continued by churches as diverse as the Congregationalists, Methodists and Presbyterians,[9] and, despite increasing secularization, lasted well into the mid twentieth century,[10]

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[9] R. Handy, at 73-77.

[10] R. Handy, at 125-127, 171. The degree to which profound religious conviction motivates observance of the "Lord's Day" is amply demonstrated, for example, in the film Chariots of Fire, depicting how Eric Liddell, a Presbyte-

as manifested, for example, in the fight over Sunday blue laws.

In fact, in response to that judicial struggle, this Court recognized the religious basis for Sunday Sabbatarianism. The Sunday Blue Law Cases, 366 U.S. 420 (1961), detail the history of the Sunday blue laws, acknowledging that they were "undeniably religious in origin." Id. at 446. The Court concluded that although Sunday blue laws coincided with the tenets of Christianity, they had become predominantly secular in purpose and effect. Nevertheless, the Court repeatedly referred to the fact that strict observance of a Sunday Sabbath is a "doctrine of the Christian Church."

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rian, refused to participate in a Sunday race during the 1924 Olympics, despite enormous pressure from his country.

McGowan, 366 U.S. at 481 (Harlan, J., concurring).[11]

Obedience to the Fourth Commandment remains a tenet of many Christian groups. The Book of Confessions of the Presbyterian Church (U.S.A.), by way of example, instructs that:

> [T]he Sabbath is to be sanctified by a holy resting all that day, even from such worldly employments and recreations as are lawful on other days; and spending the whole time in the public and private exercises of God's worship, except so much as is to be taken up in the works of necessity and mercy.[12]

Christians today remain deeply concerned over whether and how strictly

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[11] It would be highly ironic for the courts to now say that Sunday is so secularized, it can no longer be considered a holy day by anyone.

[12] Shorter Catechism of the Book of Confessions of the Presbyterian Church (U.S.A.) 7.060 (1983). The Shorter Catechism also explains that the Fourth Commandment prohibits "unnecessary thoughts, words, or works about our worldly employments or recreations." 7.061.

the Sunday Sabbath should be observed. Many Christians continue to keep the "Lord's Day" holy, despite the disappearance of Sunday blue laws and the predominance of Sunday sports and shopping.[13] Many, like Frazee, might not be able to pinpoint the precise sources of their religious beliefs. But when asked to explain why he refused to work on Sunday, Frazee answered in terms that resonate of modern Christian evangelicalism: "My personal Christian faith in the Lord." (CR 41).

As Chief Justice Burger wrote in Thomas:

> courts should not undertake to dissect religious beliefs because... [they] are not articulated with the clarity

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[13] Christianity Today reports that a random sampling of readers, presented with several religious and theological questions, rated the question, "Should Christians take their Lord's Day observance more seriously?" of highest importance. Peterson, Confessions of a Former Sabbath Breaker, Christianity Today 25-28 (Sept. 2, 1988).

> and precision that a more sophisticated person might employ.

450 U.S. at 715.

Were Frazee a theologian, and not an unemployed worker, he might have spoken with more "clarity and precision." Nevertheless, his less sophisticated, more direct, but undeniably sincere testimony about his "personal Christian faith in the Lord," professes a clearly religious conviction.

II

FREE EXERCISE PROTECTION EXTENDS TO AN INDIVIDUAL'S RELIGIOUS BELIEFS AS WELL AS TO THE TENETS OF ESTABLISHED SECTS

Although Frazee could not specify the exact tenet of his religion that dictated his Sabbath observance, he testified to a religious belief clearly consistent with Christian doctrine. Under the standard set by the Illinois

court, however, an individual cannot prevail on a free exercise claim unless he can prove that a deeply held religious conviction also stems from a "tenet or dogma of an established religious sect." 159 Ill. App. 3d at 478, 512 N.E.2d at 792.

This restrictive test would improperly embroil the courts in resolution of theological issues, Jones v. Wolf, 443 U.S. 595 (1979), and is utterly at odds with this Court's far more generous interpretation of the Free Exercise Clause. If such a test were adopted, many profoundly religious people would be deprived of a most basic freedom simply because their beliefs were not shared by other worshippers or because they could not identify the precise doctrinal source of their religious convictions.

A. The State Court's Formula Is Inconsistent With This Court's Interpretation of the Free Exercise Clause

Recognizing "the broad spectrum of religious beliefs" found among this nation's citizens, and the "diverse manner in which beliefs, equally paramount in the lives of the possessors, may be articulated," United States v. Seeger, 380 U.S. 163, 183 (1965), the Court has eschewed any requirement that the doctrine of an institutionalized religion be identified as the source of religious belief.

An individual seeking the protections of the Free Exercise Clause must, of course, convince the Court that it is religion that is at issue, and not "purely secular considerations." Wisconsin v. Yoder, 406 U.S. 205, 217 (1972). A claim must be "rooted in religious belief" and not be philosophical or personal to

invoke the guarantees of the First Amendment. Id. at 215. The appropriate inquiry is twofold: is the belief "sincerely held," and is it, "in [the individual's] own scheme of things, religious." Seeger, 380 U.S. at 185.

Undoubtedly, in Frazee's "scheme of things," refraining from work on the Sabbath because of "faith in the Lord" is both sincere and religious.[14] The Illinois court, however, mistakenly concluded that any belief that has not been traced to a specific religious tenet followed by all members of an established sect--of what validity and authority the court below did not specify--must necessarily be secular. This type of reasoning has been rejected by the Court.

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[14] Frazee's sincerity is unquestioned. 159 Ill. App. 3d at 477; 512 N.E.2d at 791.

The conscientious objector cases of the 1960's and 1970's provide an example. To qualify for an exemption under the Selective Service Act, a conscientious objection must be rooted in religion and not stem from "essentially political, sociological, or philosophical views, or a merely personal moral code."[15] This Court's decisions in Seeger, Welsh, and Gillette[16] never confused the distinction between religious beliefs and those that are philosophical or personal with the very different question of how one established that one's faith taught that all war was wrong.

The Court refused to draw a distinction between "externally and internally derived [religious] beliefs," Seeger, 380

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15 50 U.S.C. § 456(j) (1982).

16 United States v. Seeger, 380 U.S. 163 (1965); Welsh v. United States, 398 U.S. 333 (1970); Gillette v. United States, 401 U.S. 437 (1971).

U.S. at 186, and recognized that a religious belief need not be "confined in either source or content to traditional or parochial concepts of religion."[17] Welsh v. United States, 398 U.S. 333, 339 (1970) (emphasis added).

Indeed, this Court consistently has protected the individualistic, intensely personal religious belief and has not confined the Free Exercise Clause to those who "correctly perceive" the "commands of their ... faith." Thomas, 450 U.S. at 716. As the Court held in Thomas, "the guarantee of free exercise is not limited to beliefs which are shared by all the members of a religious sect." Id. at 715.

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[17] The Court's discussion of the nature of a religious belief in the conscientious objector cases, although interpreting a statute, has been recognized as relevant to constitutional analysis. See, e.g., Greenawalt, All or Nothing At All: The Defeat of Selective Conscientious Objection, 1971 Sup. Ct. Rev. 31.

The "tenets or dogma" of a religion are necessarily elastic concepts. One Jehovah's Witness may view the Witness principle of neutrality as prohibiting work with weapons; another may not. So too, one Christian may interpret the Fourth Commandment strictly and another may not. It is not the court's job to say which religious adherent is right.[18]

Undoubtedly, cases will arise where a sincerely held belief is not religious. One person may have strong practical reasons for refusing to work with

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[18] This is the principle of Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984), aff'd by equally divided court sub nom, Jensen v. Quaring, 472 U.S. 478 (1985) (per curiam). There, a Pentecostal Christian testified that, based on her own strict reading of the Second Commandment, she could not be photographed for a driver's license. Although she admitted that other Pentecostals did not share her belief, the Eighth Circuit held that her belief, "though unusual in the twentieth century," was "religious in nature." 728 F.2d at 1123. The state did not appeal this holding to this Court.

weapons; another might have a deep commitment to Sunday as a day for rest and family gatherings. Such views, however "virtuous and admirable," would not be cloaked with First Amendment protection. Wisconsin v. Yoder, 406 U.S. at 215.

But this is not that case. This Court, therefore, need not struggle here with the difficult task of defining what constitutes a religion and what distinguishes it from other comprehensive ethical systems.[19] For surely a belief premised on one's "Christian faith

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[19] In Seeger, the Court formulated a test for determining a religious belief under the Selective Service statute: "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God." 380 U.S. at 165-166. The lower courts have wrestled with the definition of religion, see, e.g., Dettmer v. Landon, 799 F.2d 929 (4th Cir. 1986), cert. denied, 107 S.Ct. 3234 (1987); Wiggins v. Sargent, 753 F.2d 663 (8th Cir. 1985); United States v. Moon, 718 F.2d 1210,

in the Lord" (CR 41) is "not merely a matter of personal preference, but one of deep religious conviction." Yoder, 406 U.S. at 216.

B. The State Court's Formula Creates An Unconstitutional Denominational Preference

Under the standard announced by the Illinois court, the guarantees of religious freedom extend only to members of "established religious sects," and even then only if the sect maintains formal "tenets or dogma" that mandate the belief

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1227 (2d Cir. 1983); Africa v. Commonwealth of Pennsylvania, 622 F.2d 1025 (3d Cir. 1981), cert. denied, 456 U.S. 908 (1982); International Society for Krishna Consciousness v. Barber, 650 F.2d 430 (2d Cir. 1981); Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979); Founding Church of Scientology v. United States, 409 F.2d1146 (D.C. Cir.), cert. denied, 396 U.S. 963 (1969), and the legal literature is filled with conflicting and abstract attempts to address this extremely difficult issue. See, e.g., Choper, Defining 'Religion' in the First Amendment, 1982 U. Ill. L. Rev. 579; Freeman, The Misguided Search for the Constitutional Definition Of "Religion," 71 Geo. L.J. 1519 (1983) (and authorities cited therein).

or practice at issue. Individuals who are not members of an established religious group, or whose religion either lacks formal doctrine or permits individual interpretation of doctrine, are stripped of the protections afforded by the Free Exercise Clause. A clearer preference for certain religions over others is hard to imagine.

The First Amendment guarantee of religious liberty depends for its continued vitality on government maintaining strict neutrality among religious groups and beliefs. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Larson v. Valente, 406 U.S. 228, 144 (1982).

Time and again, this Court has eloquently spoken of the intricate link

between the two religion clauses of the First Amendment, recognizing that:

> [T]he fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion and that it work deterence of no religious belief.

School District of Abington Township v. Schempp, 374 U.S. 208, 305 (1963) (Goldberg, J., concurring).[20]

1. Government Cannot Prefer "Established Religions"

The principle of governmental neutrality is undermined by a standard that demands an individual prove membership in

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20 See also Everson v. Board of Education, 330 U.S. 1, 15 (1947) ("neither a state nor the Federal Government can ... prefer one religion over another"); Zorach v. Clauson, 343 U.S. 306, 314 (1952) ("government must be neutral when it comes to competition among sects"); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("the First Amendment mandates government neutrality between religion and religion"); Wallace v. Jaffree, 472 U.S. 38, 52-55 (1985).

an "established religious sect" in order to seek the protections of the First Amendment.[21] The judiciary may not distinguish between longstanding religion and new religious movements without engaging in the religious favoritism prohibited by the Establishment Clause. Nor may it discriminate against the numerous "microscopic" religous sects in the United States, some of which have "only one congregation each," E. Clark, Small Sects in America 14 (rev. ed. 1965), simply because those sects are not "well-established."

In recognition of this basic principle, many courts have refused to draw

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21 The use of the term "established religious sect" is itself ambiguous; it could be drawing a distinction between established religions and newly emerging ones, or between any religious group and purely individual religious experience. It is particularly ambiguous in this case since Frazee testified he was a Christian and Christianity is undoubtedly an "established religious sect."

the very distinction proposed by the Illinois court here. In Lewis v. Califano, 616 F.2d 73 (3d Cir. 1980), for example, involving an administrative rule that disability benefits could not be denied to Christian Scientists who believed in faith healing, the Third Circuit held that the same accommodation had to be extended to "all individuals who sincerely believe in faith healing" lest government prefer "one religion (Christian Scientists) over another." Id. at 78-79.

A federal district court reached the same conclusion in Sherr v. Northport-East Northport Union Free School District, 672 F. Supp. 81, 89 (E.D.N.Y. 1987), holding that a state "limitation of a religious exemption from vaccination to those who are members of recognized religious organizations is blatantly

violative of the [Establishment Clause]."[22]

This nation celebrates an enormous diversity of religious groups and views. There are some 1,347 religious organizations described in the Encyclopedia of American Religions (2d ed. 1987).[23] Courts are ill-equipped to decide which of those religious organizations are "established" and which are not. Today's newly emerging religion lacking formal, institutionalized roots could be tomorrow's dominant religious

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22 See also In re Milton, 505 N.E. 2d 255 (Ohio 1987) (state could not compel woman who believed in faith healing to undergo surgery even though she was not a member of specific denomination or sect).

23 See Edwards v. Aguillard, 107 S. Ct. 2573, 2589 n.6 (1987) (Powell, J., concurring). As Justice Powell perceived, the "strikingly multi-religious" nature of our country "perhaps more than anything one could write, demonstrates the wisdom of including the Establishment Clause in the First Amendment."

tradition:

> [M]any of the cult groups that have arisen in the United States during the past one hundred fifty years are still alive and thriving today. Of Hoekema's "four major cults" --Christian Science, Jehovah's Witnesses, Mormonism, and Seventh-Day Adventism--three are today among the fastest growing groups in the United States. From the perspectives of world history, it is apparant that many groups that were initially viewed as cults-- Christianity, Islam, and Buddhism, among others-- have subsequently become among the largest and most influential religious movements in the world.[24]

A judicial standard that limits religious freedom to established religious groups ignores the striking

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[24] Foster, "Cults in Conflict & New Religious Movements and the Mainstream Religious Tradition in America," in Uncivil Religion - Interreligious Hostility in America at 188 (R. Bellah & F. Greenspan eds. 1987) (referring to A. Hoekema, The Four Major Cults - Christian Science - Jehovah's Witnesses - Mormonism - Seventh Day Adventism (1963)). See also D. Kelley, Why Conservative Churches Are Growing, 20-32, 56-77 (Rose ed. 1986).

religious diversity of our nation and offends the most fundamental principles embodied in the Establishment Clause.

2. Government Cannot Prefer Religions With Strict Tenets or Dogma

There is a second problem with the formula proposed by the Illinois state court. Even if an individual is able to prove that he is a member of what the court considers an "established religious sect," he must still convince the court that his religious convictions stem from a "tenet or dogma" of his sect. Individual interpretation of scripture or of a sect's teachings, even if recognized or encouraged by the sect, will not be treated as religion under the Free Exercise Clause.

This standard assumes that every religion demands adherence to a specific set of beliefs and tolerates no unorthodoxy. It then favors only those reli-

gions that fit this narrow assumption. This, too, violates the "denominational neutrality" mandated by the Establishment Clause.[25]

Frazee, whose testimony reflects he is a Protestant Christian, exemplifies what is wrong with this standard. Based on his "personal Christian faith in the Lord," Frazee believes it is wrong to work on Sunday even though his church, apparently, does not require Sabbath observance. His adherence to this belief is a classic example of Protestantism: he follows his personal understanding of God's commands, rather than a preordained set of rules devised for him by others.

The Protestant Reformation greatly expanded the role of the individual in

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25 See Larson v. Valente, 456 U.S. at 246, and cases cited at note 34-35, supra.

scriptural interpretation.[26] To this day, Protestantism stresses the pre-eminence of individual judgment and interpretation of scripture. This "principle of 'private judgment' in the interpretation of scripture accounts for the great variety of sects and churches typical of Protestantism, in which many shades of doctrine and practice are found." The Oxford Dictionary of the Christian Church (2d ed. 1974) (Protestantism).

Although the church plays an essential role in many Protestant denominations, the Bible is accessible to all, and an individual's direct experience or response to the word of God is recognized

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26 See, e.g., 12 Encyclopedia of Religion (M. Eliade ed. 1987) (Protestantism) and (Reformation); O. Chadwick, The Reformation 442-444 (1965); A. Knudson, "Cardinal Principles of Protestanism" in Protestanism (Anderson ed. 1944).

as the primary vehicle for determining one's religious convictions.[27]

It is thus possible for a Pentecostal Christian to believe that the Second Commandment forbids the making of photographs, based on her own reading of the Bible, even though other Pentecostal Christians disagree.[28] Similarly, a Baptist may read the New Testament as forbidding social security numbers because they represent the "mark of the beast."[29] And surely one "Christian" might believe that work on Sunday is wrong even though the vast majority of

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27 12 Encyclopedia of Religion, supra, note 26. See also A. McGrath, Reformation Thought 101-104 (1988); J. Reid, The Authority of Scripture (1957).

28 Quaring v. Peterson, 728 F.2d at 1123.

29 Callahan v. Woods, 658 F.2d 684 (9th Cir. 1984); Stevens v. Berger, 428 F. Supp 896 (E.D.N.Y. 1977).

Christians no longer observe the Sunday Sabbath.[30]

If free exercise protection is guaranteed only to individuals whose beliefs are found in the "tenets or dogma" of an established religion, legalistic or hierarchical religious groups will necessarily be preferred over informal, more personal ones. The Establishment Clause stands as a barrier to that type of judicial preference.

C. The State Court's Formula is Unworkable

The rigid standard anounced by the Illinois state court also has severe practical failings. To require an individual to cite the precise source of his religious belief in order to qualify for free exercise protection is to ignore

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30 This would be particularly true if Frazee considered himself a fundamentalist Christian since, as noted above, fundamentalists are especially individualistic in their religious views. See Marty, supra, note 8. Cf. Thornton v. Caldor, 472 U.S. 703 (1985) (Presbyterian observance of Sunday Sabbath based on sincere religious conviction).

the setting in which these claims so often arise.

The claimant is rarely a sophisticated individual, well versed in both law and theology. Although genuinely convinced that his religion prohibits or mandates certain conduct, the claimant is unlikely to be aware of the standards that have evolved for successfully stating a free exercise claim and is unlikely to have counsel to assist him.

In many cases, such as this one, the hearing to determine the validity of a religious claim is informal. Often those in charge, the hearing examiners, are no more versed in constitutional law than is the claimant, so the questions asked do not elicit constitutionally relevant responses.[31]

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[31] In this case, for example, Frazee was never asked whether he is a member of a particular Protestant denomination;

To insist on doctrinal precision in such a setting is untenable. The typical claimant cannot be expected to know the litany to follow in order to convince a tribunal that his sincerely held beliefs are also religious. As a result, many who are passionate in their religious convictions will be denied free exercise protection simply because they lacked the sophistication necessary to attribute their beliefs to an acceptable source or the legal knowledge that it is necessary to "make a record" on this point.

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whether he belongs to a church; whether he attends church; whether other church members share his beliefs; or whether he has ever violated those beliefs. The record is almost non-existent. Frazee's case is hardly unique. In Gleason v. Blache, 487 So.2d 561 (La. App. 1986), for example, the claimant testified she could not wear trousers on the job for "religious reasons." The record was so devoid of "essential information," the court was forced to remand to determine the religious basis for her claim.

Unless the guarantees of free exercise are to be limited to those religious adherents whose beliefs are so widely known they are beyond question, proof that a belief is genuine and rooted in religion ought to suffice.

D. Sincerity Analysis Will Detect Fraudulent Claims

The standard announced by the Illinois court ostensibly is designed to ensure that false claims for religious accommodation are not credited. It is, however, fatally overbroad and will result in the denial of many sincerely based religious claims, as evidenced by the denial of benefits for Mr. Frazee.

Clearly, if only members of "established religious sects" who can pinpoint the precise doctrinal sources of their religious beliefs state cognizable free exercise claims, purely personal, philosophical or moral claims will be

weeded out. Unfortunately, many purely religious claims will likewise be weeded out, yet some fraudulent claims asserted on the basis of established religious doctrine will survive. If all a claimant need do is point to the doctrine of an established religious sect, the sincerity inquiry is reduced to proof of a readily understood and precisely articulated religious tenet held by others.[32]

Fraudulent claims are best dealt with by searching examination into a claimant's sincerity, not by limiting who can bring a free exercise claim or what kind of claim will be recognized.[33]

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[32] See Clark, Guidelines For the Free Exercise Clause, 82 Harv. L. Rev. 327, 340 (1969), criticizing a similar standard proposed in Dodge, The Free Exercise of Religion: A Sociological Approach, 67 Mich. L. Rev. 679 (1969).

[33] The Third Circuit recognized this in Lewis v. Califano. When faced with an individual who believed in faith healing even though it was not a tenet of her church, the court wrote: "an inquiry

And while evaluating sincerity is a delicate task, "the difficulty of distinguishing those who are conscientious from those who are not cannot obviate the necessity for doing so." Clark, Guidelines For the Free Exercise Clause, 82 Harv. L. Rev. 327, 338 (1969).

Fact-finding tribunals are accustomed to judging credibility, sifting evidence and weighing inconsistencies in testimony. Sincerity analysis is a standard component of the ajudicatory process,[34] and the courts routinely

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[into the tenets of a sect] is proper in helping to establish sincerity. However, as sincerity can be determined by other means, the mere absence of a sect supporting an individual's belief need not require a presumption that the belief is insincere." 616 F.2d at 79, n.12 (citations omitted).

34 See Pepper, Taking the Free Exercise Clause Seriously, 1986 B.Y.U.L. Rev. 299, 325-331 (1986).

have dismissed sham religious claims.[35]

Fact finding tribunals are free to question a claimant about his professed religious belief to determine whether the belief has been concocted for ulterior purposes. Thus, although religious beliefs do not have to be internally consistent, Thomas, 450 U.S. at 714, an individual who refuses Sabbath work can and should be probed about other "worldly

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35 See, e.g., Sherr v. Northport-East Northport Union Free School District, 672 F. Supp. 81 (E.D.N.Y. 1987) (refusal to allow vaccination of children not "sincerely" religious where religious reasons fabricated after non-religious reasons failed); Ideal Life Church v. County of Washington, 304 N.W.2d 308 (Minn. 1981) (ministry formed solely to evade taxes); Theriault v. Silber, 453 F. Supp. 254 (W.D. Tex. 1978), appeal dismissed, 579 F.2d 302, cert. denied, 440 U.S. 917 (1979) (prison "religion," Church of the New Song, a "masquerade" designed to obtain First Amendment protection for unlawful acts); United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968) (religious mandate to use drugs found insincere).

employments" undertaken on the Sabbath.[36]

Similarly, fact finding tribunals can and should consider how great the incentive is to manufacture a claim for religious immunity. If it is likely that many people would fake a religious belief to obtain a particular benefit--as it might be for a religious exemption from paying taxes or serving in the armed forces--the bona fides of the claim must be thoroughly examined.[37] And while sincerity should not be assumed, it is also relevant if the individual is placed at a disadvantage because of religion--

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36 See, e.g., Dobkin v. District of Columbia, 194 A.2d 657 (D.C. App. 1963) (claim that attendance at trial on Sabbath violated religious beliefs undermined by proof that claimant worked on Sabbath).

37 See Freed & Polsby, Race, Religion and Public Policy: Bob Jones University v. United States, 1983 Sup. Ct. Rev. 1, 20-26; Pepper, supra, at 325-326. See also Patrick v. Lefevre, 745 F.2d 153, 157 (2d Cir. 1984) (sincerity analysis can distinguish true belief from belief motivated by "self indulgence" or the desire for "material gain.")

as, for example, he would be if, as here, religious belief prevented the claimant from obtaining a job, or a driver's license,[38] or some other widely available governmental benefit.

The Illinois court proclaimed that "if all Americans were to abstain from working on Sunday, chaos would result." 159 Ill. App. 3d at 478, 512 N.E. 2d at 792. Most Americans do not strictly observe the Sunday Sabbath and probably would not profess to do so in order to obtain unemployment compensation benefits. A similar concern was expressed by the state in Sherbert and quickly rejected by this Court: "there is no proof whatever to warrant such fears of malingering or deceit." 374 U.S. at 407. The Illinois court chose to

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38 See Jensen v. Quaring, 472 U.S. 478 (1985) (per curiam), aff'g by equally divided court, Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984).

respond to its concerns by restricting the number of religious beliefs recognized as valid under the Free Exercise Clause. Under this Court's decisions, that is not an appropriate response.

* * * *

Mr. Frazee clings to a religious tradition that apparently has been abandoned by the majority of his fellow Christians. Like most other religious adherents who seek to invoke the protections of the Free Exercise Clause, he is, in this sense, a member of a religious minority.

Under the state court standard, religious minorities can be denied religious freedom if their views are considered extreme, outdated or eccentric. Yet it is precisely those minorities who lack the political power to ensure adequate legislative or

administrative accommodation of their religion and who are, therefore, most in need of judicial protection.

Any standard that protects the religious practices and beliefs of only the well-established religions, but denies the same protections to the wealth of people in this country whose religious practices and beliefs are little understood, undermines the guarantee of religious liberty promised to <u>all</u> by the First Amendment.

CONCLUSION

For the reasons stated, the judgment of the Illinois Appellate Court should be reversed.

Amy Adelson
Counsel of Record
Lois C. Waldman
Marc D. Stern
Jeremy S. Garber
American Jewish Congress
15 East 84th Street
New York, NY 10028
(212) 879-4500

Sarah Barringer Gordon, Esq.
Fine, Kaplan & Black
1845 Walnut Street
Philadelphia, PA 19103
(215) 567-6565
Of Counsel

AMICUS CURIAE

BRIEF

No. 87-1945 (9)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM A. FRAZEE,

Appellant,

v.

DEPARTMENT OF EMPLOYMENT SECURITY, an Administrative Agency of the State of Illinois; SALLY WARD, Director of the Illinois Department of Employment Security; and BRUCE W. BARNES, Chairman, Board of Review, and KELLY SERVICES,

Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS
FOR THE THIRD DISTRICT

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, *AMICUS CURIAE*, IN SUPPORT OF APPELLANT

Counsel of Record:

STEVEN M. FREEMAN
Anti-Defamation League of B'nai B'rith
823 United Nations Plaza
New York, NY 10017
(212) 490-2525

Of Counsel:

MEYER EISENBERG
JEFFREY P. SINENSKY
JILL L. KAHN
RICHARD E. SHEVITZ
Anti-Defamation League of B'nai B'rith
823 United Nations Plaza
New York, NY 10017
(212) 490-2525

QUESTION PRESENTED

Did the Appellate Court of Illinois violate the first amendment in holding that William A. Frazee is ineligible for unemployment benefits because his sincerely held religious belief, which prohibits him from working on Sunday, does not derive from the tenets of any particular established religious sect?

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CONSENT OF THE PARTIES

All parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle that these goals and the general stability of our democracy are best served through the vigorous protection of the separation of church and state and through the right to the free exercise of religion.

In support of this principle, the League has previously filed briefs as a friend of the court in numerous cases dealing with the religious liberty clauses of the first amendment. *See*, e.g. *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Sherbert v. Verner*, 374 U.S. 398 (1963). The League is able to bring to this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms. In addition, as an organization with a Jewish perspective, the League is particularly well suited to address this appeal since it implicates the free exercise rights of the Jewish community.

STATEMENT OF THE CASE

The Anti-Defamation League of B'nai B'rith incorporates the statement of the case as set forth in the Brief of Appellant.

SUMMARY OF ARGUMENT

The appellate court's holding that Mr. Frazee's sincerely held religious beliefs are not protected by the First Amendment because he is not a member of an established religious sect should be reversed, because it deprives him of a fundamental liberty and ignores

the teachings of this Court. This Court has held repeatedly that the free exercise clause of the First Amendment prohibits a state from denying unemployment benefits to an individual who, like Mr. Frazee, must decline employment because it conflicts with sincerely held religious beliefs, regardless of the sectarian or doctrinal sources of the individual's beliefs.

The decision of the appellate court also should be reversed because it threatens the religious liberty of Jews and others who practice their religious beliefs but do not belong to an organized religious body.

Finally, the decision of the appellate court should be reversed because it relied upon speculative fears regarding the potential consequences of a more widespread belief in refraining from Sunday labor, thus allowing contemporary attitudes toward Sunday activity to infringe upon Mr. Frazee's constitutional right to the free exercise of his religious beliefs.

ARGUMENT

I. The Free Exercise Clause Protects Mr. Frazee's Sincerely Held Religious Beliefs Regardless Of Whether He Is A Member Of An Established Religious Sect.

The first amendment to the United States Constitution provides, in part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

U.S. Const. amend. I.

The free exercise clause prohibits the government from interfering with the right to worship in accordance with the dictates of one's conscience. This Court recently restated this essential principle in *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985):

> Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

The decision of the appellate court violates Mr. Frazee's first amendment right to worship according to his sincerely held religious beliefs and therefore must be reversed.

Mr. Frazee is a Christian whose religious beliefs prohibit him from participating in profitable labor on Sunday. Motion of State Appellees to Dismiss or Affirm, p.2, (citing certified record filed with Appellate Court of Illinois). The appellate court held that because Mr. Frazee is not a member of an established religious sect, he could not receive unemployment benefits when he declined employment which would have required him to violate his sincerely held religious belief prohibiting Sunday labor. *Frazee v. Dept. of Employment Security*, 159 Ill. App. 3d 74, 512 N.E.2d 789 (1987). This holding not only deprives Mr. Frazee of his constitutional right to the free exercise of his religion, but also conflicts with three decisions of this Court which compel precisely the opposite result. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987).

In *Hobbie*, this Court recently reaffirmed the basic principle established in *Sherbert* and *Thomas*, the landmark cases in this area: under the free exercise clause, a state cannot deny important benefits because of conduct mandated by sincerely held religious beliefs.

The appellate court recognized that Mr. Frazee was unable to accept employment due to his sincerely held religious beliefs, but it limited the application of the free exercise clause in this context to individuals who are exercising "the tenet, belief, or teaching of an established religious body." 512 N.E.2d at 791. Since Mr. Frazee is not a member of an established religious body, the appellate court held that he was ineligible for unemployment benefits.

It is axiomatic that the free exercise clause protects individuals like Mr. Frazee, whose religious beliefs are sincerely held and rooted in religion. In *Wisconsin v. Yoder*, Chief Justice Burger explained, "to have the protection of the Religion Clauses, the claims [to the free exercise of religion] must be rooted in religious beliefs." 406 U.S. 205, 215 (1972). In *United States v. Seeger*, this Court set forth the principle that a religious belief must be sincerely held to be protected by the free exercise clause, 380 U.S. 163 (1965).

Based on *Seeger* and *Yoder*, the lower federal courts have developed a straightforward, two-part inquiry in analyzing whether asserted religious beliefs are protected by the free exercise clause. The test, recently affirmed by this Court, requires only that the beliefs must be sincerely held and rooted in religion in order to enjoy the protection of the first amendment. *Quaring v. Peterson*, 728 F.2d 1121, 1123 (8th Cir. 1984), *aff'd*, 472 U.S. 478 (1985); *see also Wilson v. Schillinger*, 761 F.2d 921 (3rd Cir. 1985) *cert. denied* 475 U.S. 1096 (1986); *Callahan v. Woods*, 658 F.2d 679 (9th Cir. 1981).

Almost a century ago, this Court rejected the distinction, now revived by the appellate court, limiting the protection of the first amendment to the tenets or doctrines of particular sects. In *Davis v. Beason* Justice Field explained:

> The term 'religion' has reference to one's view of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The First Amendment to the constitution, in declaring that congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper . . . .

133 U.S. 333, 347 (1890).

Moreover, in each decision prohibiting state authorities from denying unemployment benefits to individuals whose sincerely held religious beliefs caused them to forego employment, this Court emphasized that the first amendment protects the sincere religious beliefs of individuals, regardless of their sectarian affiliations. In *Sherbert*, Justice Brennan, writing for the Court, held that an individual could not be denied unemployment benefits when she lost her job due to her religious beliefs. While the plaintiff happened to be a Seventh Day Adventist, the Court focused upon her "conscientious scruples" and her "conscientious objection to Saturday work", not upon the sectarian sources of her belief against Sabbath labor. 374 U.S. at 399, 403.

In *Thomas*, Chief Justice Burger emphatically rejected the significance of sectarian affiliations under the free exercise clause. Thomas, a Jehovah's Witness, felt compelled by his religious belief to terminate his employment when his department was closed and he was transferred to a division which manufactured armaments. The state contended that the free exercise clause somehow might not protect his sincerely held religious belief because another employee who was also a Jehovah's Witness did not hold the same belief. This Court refused to entertain attempts to limit the application of the free exercise clause to beliefs rooted in specific sectarian doctrine:

> One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation as not to be entitled to protection under the free exercise clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all the members of a particular sect . . . . Courts are not arbiters of scriptural interpretation.

450 U.S. at 715-716.

In *Hobbie*, the government contended that the first amendment should not protect the sincerely held religious belief of an employee whose newly adopted faith caused her to leave a job which required working on the Sabbath. Once more, this Court found formal religious affiliations insignificant, and held that "the First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired." 480 U.S. at 144.

This Court has recognized in other contexts as well that the first amendment would have little value if it protected merely the right to worship according to the doctrines of particular sects. The Court recently dismissed this proposition in *Wallace v. Jaffree:*

> [T]he individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist or the adherent of a non-Christian faith such as Mohammedism or Judaism. . . . [T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.

472 U.S. 38, 52-53 (1985). Similarly, in a case of first impression, a district court recently relied on this Court's teachings to reject a statutory preference for established religious bodies over personally held religious beliefs. In analyzing a New York statute which specifically exempted members of certain religious sects from inoculation requirements, the district court held that such an exemption violates

both the establishment clause and the free exercise clause of the first amendment.[1]

The principle that the first amendment protects the rights of individuals to hold whatever religious beliefs they choose can be found in a frequently cited passage from the influential writings of James Madison. In his 1785 "Memorial and Remonstrance Against Religious Assessments," Madison declared:

> The Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."

5 *The Founder's Constitution*, p. 82.

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[1]In *Sherr v. Northport—East Northport U. Free Sch.*, a state statute exempted members of certain sects from inoculation requirements. 672 F. Supp. 81 (E.D.N.Y. 1987). The district court recognized:

> [The statute] makes available to members of certain religious organizations to which the state has given some sort of official recognition a statutory benefit for which other individuals who may belong to either an unrecognized religious group or possess their own personal religious beliefs are not eligible. The establishment clause surely cannot mean much if a preferential restriction such as that contained in [the statute] can pass constitutional muster.

Id. at 90.

Applying *Sherbert*, the district court also held that the statute violated the free exercise clause:

> A claim by an individual of entitlement to a religiously-based exclusion from. . . [the] inoculation program even though he is not actually a member of a "recognized religious organization" clearly involves a religious belief or practice. . . . [D]efendants have not advanced, nor can the Court on its own conceive of, any compelling societal interest that might justify the burden placed upon the free religious exercise of certain individuals while other persons remain free to avoid subjecting their children to a religiously objectionable medical technique merely because they may belong to a particular religious organization to which the state has given a stamp of approval.

Id.

Despite this Court's clear holdings that the free exercise clause prohibits a state from denying unemployment benefits to those whose sincerely held religious beliefs cause them to lose employment, the appellate court, in a cavalier detour from the principles enshrined in the first amendment and developed by this Court, discerned a "thread" running through *Sherbert*, *Thomas*, and *Hobbie* with which it wove a new restraint on the scope of the first amendment that deprived Mr. Frazee of his free exercise rights:

> An examination of the foregoing cases reveals that a common thread was running through each case, namely, that in each case the claimant was a member of an established religious sect or church; that each of the claimants in refusing to work at a particular place or time was exercising what was believed to be a tenet, belief or teaching of a established religious body.

512 N.E.2d at 790.

The sectarian affiliations in *Sherbert*, *Thomas*, and *Hobbie*, however, were not material to the result in those cases. *See*, e.g. *Thomas*, 450 U.S. 715-716. The sectarian origins of the beliefs held to be constitutionally protected in those cases in no way distinguish them from Frazee's right to the free exercise of his sincerely held religious beliefs. The "thin and fragile line" drawn by the appellate court does not rest on viable constitutional grounds. 512 N.E.2d at 790.

The uncontradicted record demonstrates that Mr. Frazee's personal religious commitment to refraining from Sunday labor is both sincerely held and rooted in religion. After noting the sincerity of Mr. Frazee's belief, the appellate court discussed the Biblical origins of the injunction against Sabbath labor, the observance of this tenet by the early Christians, and the colonial legislation prohibiting work on Sunday. 512 N.E.2d at 791-792. Indeed, the prohibition against Sabbath labor remains a part of the formal doctrine of many Christian faiths. *See*, XIII *New Catholic Encyclopedia*, p. 799; *Book of Confessions*, Presbyterian Church, (U.S.A.) Section 5.224; *The Book of Discipline of the Methodist Church*, Article XIV, (1984). It is ironic that the appellate court refused to grant constitutional protection to a belief which is a conventional tenet of the Christian faith and other religious traditions.

According to the decision below, if one is to enjoy the protection of the free exercise clause in the state of Illinois, one's religious beliefs must not only be sincerely held and rooted in religion, but they must also derive from the tenets or doctrine of a given sect. This additional requirement violates the first amendment and cannot survive constitutional scrutiny.

II. The Decision Of The Appellate Court Threatens The Religious Liberty Of All Who Hold Sincere Religious Beliefs But Who Are Not Members Of Sectarian Religious Bodies.

Several studies illustrate the common-sense reality that many Americans observe their personal religious beliefs without identifying with the tenets of a specific religious denomination. Indeed, a recent study of the American Jewish community underscores the seriousness of the threat posed by the decision of the appellate court to the religious freedom of such individuals.

The Orthodox, Conservative, and Reform movements constitute the major sects or denominations within American Judaism. Over 37% of American Jews, however, consider themselves Jewish but do not identify with any one of these three sects. Steven M. Cohen, *1984 National Survey of American Jews*, p. 47 (1984). Nevertheless, 86% of American Jews observe the Passover holiday, a significant religious holiday in the Jewish calendar. In other words, like Mr. Frazee, a sizeable minority of this country's Jewish community practice their religion without belonging to one of their faith's established subdivisions. *id*.

The reasoning of the appellate court would pose a threat to the free exercise rights of unaffiliated American Jews who observe their religious holidays. For example, the Passover holiday involves a festive meal and worship service which often conflicts with employment schedules. Under the analysis of the appellate court, a Jewish employee whose sincere religious beliefs required him to leave work early to celebrate the Passover holiday might be denied that right if that individual happened to be among the 37% of Jews not aligned with one of the major denominations within Judaism.

The example of Passover and statistics drawn from the Jewish population merely identify one possible consequence of the appellate court's decision limiting the scope of the free exercise clause. If the decision is allowed to stand it would likely affect the sincerely held religious beliefs of individuals from a wide range of religious backgrounds.

Requiring membership in an organized religious body as a prerequisite to the exercise of one's first amendment rights eviscerates a fundamental right guaranteed by the United States Constitution. The decision of the appellate court must be reversed because it threatens to deprive Jews and others of the right to the free exercise of their religion if they are not members of an established sect.

III. The Decision Of The Appellate Court Improperly Relied Upon Speculative Reasoning Not Supported By The Record.

In denying first amendment protection to Mr. Frazee's religious belief prohibiting Sunday labor, the appellate court speculated on the economic ills which would flow from a more widespread acceptance of that belief:

> What would Sunday be today if professional football, baseball, basketball and tennis were barred. Today Sunday is not only a day for religion, but for recreation and labor. Today the supermarkets are open, service stations dispense fuel, utilities continue to serve the people and factories continue to belch smoke and tangible products . . . . If all Americans were to abstain from working on Sunday, chaos would result.

512 N.E.2d 792.

The appellate court's rhetorical questions regarding the fate of professional athletics or the economy cannot nullify the first amendment's protection of Mr. Frazee's sincerely held religious beliefs. A sufficiently compelling government interest may justify an infringement upon one's free exercise rights, but the unsupported musings of the appellate court hardly constitute a compelling governmental interest. *Yoder*, 406 U.S. at 211.

This Court rejected similar speculative reasoning in *Thomas*. In that case, the state court had relied upon the potential for economic harm if large numbers of Sabbatarians sought unemployment benefits. Chief Justice Burger dismissed this approach:

> There is no evidence in the record to indicate that the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large enough to create "widespread unemployment", or even to seriously affect unemployment . . . .

450 U.S. at 719. The same reasoning mandates the same conclusion here.

The appellate court believed that the changes in contemporary American society "dictate" that Sunday no longer be treated as a day of worship. 512 N.E.2d at 792. In deferring to this current attitude towards Sunday, the appellate court ignored the first amendment rights of all whose religious beliefs hold Sunday to be a day of rest, whether they draw their faith from personal religious beliefs or from the specific tenets of an established sect. The first amendment does not permit a state court to gauge contemporary attitudes and to allow those attitudes to determine the religious practices of others. As this Court observed in *Board of Education v. Barnett*:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

319 U.S. 624, 642 (1943).

The appellate court's fears regarding the potential consequences if the belief in abstaining from Sunday labor became more widespread cannot require Mr. Frazee to conform his traditional interpretation of the Christian Sabbath to a more contemporary view. In denying him his free exercise rights because his personal religious beliefs do not comport with currently prevailing attitudes, the appellate court effectively undermined the first amendment's guarantee of individual religious liberty.

CONCLUSION

For the reasons stated above, the Anti-Defamation League of B'nai B'rith respectfully urges that the decision of the appellate court be reversed.